Supreme Court, U.S.
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No. ____

In the
Supreme Court of the United States

PORT AUTHORITY
OF ALLEGHENY COUNTY,
Petitioner,

v.

DANIELLE STANGL
And YVETTE KOERNER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Third Circuit erred in denying sovereign immunity under the Eleventh Amendment to a government transit agency that is recognized as a state agency under state law and where a majority of its funding is provided by the State?

PARTIES TO THE PROCEEDING

Petitioner is the Port Authority of Allegheny County. Petitioner is a government agency created by an act of the Pennsylvania legislature dated April 6, 1956, and titled "The Second Class Port Authority Act," 55 PA. CON. STAT. § 551, *et seq.* Petitioner was appellant in the proceedings before the United States Court of Appeals for the Third Circuit. Petitioner is referred to herein as "Port Authority."

Respondents are Danielle Stangl and Yvette Koerner. Respondents are employees of the Port Authority. Respondents assert claims against Port Authority and William McArdle for alleged violations of their civil rights pursuant to, *inter alia*, 42 U.S.C. § 1983. Respondents were appellees in the proceedings before the United States Court of Appeals for the Third Circuit.

William McArdle is the Chief of Transit Police and Security for Port Authority and a named defendant in the proceedings before the United States District Court for the Western District of Pennsylvania. William McArdle is not a Petitioner.

TABLE OF CONTENTS

Parties to the Proceedings ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Writ 4

The court of appeals misconstrued and disregarded this Court's precedents and intensified a circuit conflict by denying Eleventh Amendment immunity to a state-created government transportation agency recognized and funded as a state agency under Pennsylvania law 6

The Commonwealth of Pennsylvania conferred its sovereign immunity upon Port Authority and Pennsylvania's courts recognize Port Authority as an agency and arm of the State 8

The Court of Appeals misconstrued *Hess* and rendered judgment in conflict with other circuits on the state funding issue 10

Conclusion 14

Appendix 1a

TABLE OF AUTHORITIES

Cases

Alaska Cargo Transport, Inc. v. Alaska R. Corp., 5 F.3d 378 (9th Cir. 1993) . . 11, 13

Alden v. Maine, 527 U.S. 706 (1999) 5, 7, 9, 10

Doe v. Regents of the University of California, 519 U.S. 425 (1997) 7, 9

Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743 (2002) 5, 7, 9, 10

Hans v. Louisiana, 134 U.S. 1 (1890) 6

Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30 (1994) . . . . . *passim*

James J. Gory Mechanical Contracting, Inc. v. Philadelphia Housing Authority, 855 A.2d 669 (2004) 9

Marshall v. Port Authority of Allegheny County, 568 A.2d 931 (Pa. 1990) 8

Morris v. Washington Metropolitan Area Transit Authority, 781 F.2d 218 (D.C. Cir. 1986) 11, 12

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 6, 7

Ristow v. South Carolina Ports Authority, 58 F.3d 1051 (4th Cir. 1995) 13

Constitutional Provision

U.S. Const. amend. XI . . . . . *passim*

Statutes

42 PA. CON. STAT. § 8521 . . . . . 1, 3, 8
55 PA. CON. STAT. § 551 . . . . . 1, 2
55 PA. CON. STAT. §553(a) 2, 8
55 PA. CON. STAT. § 553(b)(18) 3
55 PA. CON. STAT. § 553.2(a)(1) 4
55 PA. CON. STAT. § 553.4 3
55 PA. CON. STAT. § 557.1 3
55 PA. CON. STAT. § 562 3
55 PA. CON. STAT. § 563.1 3
74 PA. CON. STAT. § 1301 . . . . . 1, 3
74 PA. CON. STAT. § 1303(g) 4
74 PA. CON. STAT. § 1310(e) 4
74 PA. CON. STAT. ANN. § 1310.1 . . . . . 1, 3
74 PA. CON. STAT. § 1311(a) 4
74 PA. CON. STAT. § 1315(a-c) 4
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 2
42 U.S.C. § 1983 . . . . . 1, 2

STATEMENT OF OPINIONS BELOW

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 22, 2006. The opinion of the Court of Appeals was filed on May 22, 2006. (App. 1a). The opinion of the District Court was filed on June 10, 2005. (App. 8a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 2006. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eleventh Amendment to the United States Constitution which provides as follows:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State.

Relevant provisions of The Second Class Port Authority Act, 55 PA. CON. STAT. § 551, *et seq.*, Sovereign Immunity Act, 42 PA. CON. STAT. § 8521, *et seq.*, Public Transportation Assistance Act, 74 PA. CON. STAT. § 1301, *et seq.*, Supplemental Public Transportation Assistance Funding Act, 74 PA. CON. STAT. ANN. § 1310.1, *et seq.*, and 42 U.S.C. § 1983 are set out in the appendix to this Petition.

STATEMENT OF THE CASE

The Third Circuit misconstrued and disregarded this Court's precedents in denying Port Authority's claim to sovereign immunity as an arm of the Commonwealth of Pennsylvania. In so doing, the court intensified a circuit conflict by denying immunity to Port Authority where other circuits—and this Court—endorsed the sovereign immunity of similar state-created and state-funded transit agencies. The decision likewise conflicts with the well settled precedent of the Pennsylvania Supreme Court which recognizes that Port Authority is an agency and arm of the Commonwealth of Pennsylvania that shares co-equally in the State's sovereign immunity.

This action seeks recovery of damages from Port Authority and William McArdle for alleged violations of Respondents' civil rights pursuant to, *inter alia*, 42 U.S.C. § 1983. Respondents claim that Port Authority and McArdle discriminated against them on the basis of their gender during the course of their employment with Port Authority. The underlying action was filed by Respondents in the United States District Court for the Western District of Pennsylvania based upon the federal question jurisdiction of the federal district courts pursuant to 28 U.S.C. § 1331.

Port Authority is a government transportation agency created by act of the Pennsylvania legislature. 55 PA. CON. STAT. § 551, *et seq.* Port Authority is charged with managing, supervising, and maintaining exclusive jurisdiction over all commercial passenger vehicular, rail and water transportation within its geographical boundaries. The Act provides that Port Authority "exercis[es] the public powers of the Commonwealth *as an agency thereof.*" 55 PA. CON. STAT. § 553(a) (emphasis added). Port Authority is immune

from liability under the Sovereign Immunity Act, 42 PA. CON. STAT. ANN. § 8521, *et seq.*, to an extent co-equal with that of the Commonwealth of Pennsylvania. Port Authority is exempt from state taxation. 55 PA. CON. STAT. § 562. Port Authority may not pledge the credit or taxing power of the Commonwealth and any debts or judgments against Port Authority shall not be deemed to be obligations of the State. 55 PA. CON. STAT. § 553(b)(18). Port Authority may exercise the power of eminent domain. 55 PA. CON. STAT. § 557.1. Port Authority maintains primary and exclusive jurisdiction regarding public transportation and conveniences within its geographical region superior to other state agencies such as the Pennsylvania Public Utility Commission. 55 PA. CON. STAT. § 563.1.

Since Port Authority's inception, its operation has been heavily subsidized by the Commonwealth, and nearly sixty percent of its current operating budget is provided by the State. Port Authority is authorized to include such subsidies in its annual budget pursuant to its enabling legislation. *See* 55 PA. CON. STAT. § 553.4(a) ("The budget shall reflect as nearly as possible the estimated revenues, including governmental operating subsidies . . ."). In 1991, the Pennsylvania Public Transportation Assistance Act, 74 PA. CON. STAT. § 1301, *et seq.*, established a complex funding formula whereby the Commonwealth established a dedicated stream of funding to Port Authority. In order to further increase the Commonwealth's proportion of funding, the legislature enacted the Supplemental Public Transportation Assistance Funding Act, 74 PA. CON. STAT. § 1310.1, *et seq.*, in 1997. This law further dedicated a proportion of 1.22% of the revenues collected by the Commonwealth under statewide sales and use taxes directly to Port Authority for payment of its operating expenses. 74 PA. CON. STAT. § 1310.1(a).

The Commonwealth exercises significant control over the operations of Port Authority. The Commonwealth sets performance standards and measures for its passenger operations, requires Pennsylvania Department of Transportation approval for capital projects, requires audits and submission of all budgets, and requires the performance of customer satisfaction surveys. *See* 74 PA. CON. STAT. §§ 1303(g); 1310(e); 1311(a); 1315(a-c). At least once every four years, the Auditor General of the Commonwealth conducts an audit of Port Authority's operations and finances. 55 PA. CON. STAT. § 553.2(a)(1).

REASONS FOR GRANTING THE WRIT

The Commonwealth of Pennsylvania is a sovereign state. Pennsylvania's structure, laws, and jurisprudence are due the dignity and respect of a joint sovereign within the federal system. It is Pennsylvania's prerogative to organize itself and execute its duties and functions in any manner in which it sees fit. Where Pennsylvania has created an agency such as the Port Authority, delegated to that agency executive duties and functions, provided a predominate source of funding for its operations, expressly conferred its sovereign immunity upon that agency, and its courts recognize the entity as an agency of the Commonwealth exercising the Commonwealth's state powers, such action must be respected and regarded as inviolable by the federal courts.

Notwithstanding Pennsylvania's clear and unequivocal creation and maintenance of Port Authority as a state agency, the district court and court of appeals refused to acknowledge that Port Authority is entitled to sovereign immunity pursuant to the Eleventh Amendment as an agent or arm of the State. The court of appeals disregarded this Court's holding in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994),

and more recent holdings in *Alden v. Maine*, 527 U.S. 706 (1999) and *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002) (hereinafter "FMC"), by failing to recognize the States' primary interest in maintaining their sovereignty and integrity in the federal system. Indeed, the court of appeals abridged this Court's holding in *Hess* to implicitly eliminate any practical examination of the preservation of state sovereignty and explicitly eliminate the "twin reasons" for state sovereignty—according States respect as joint sovereigns and providing protection from federal judgments—and rendering the protection from federal judgment as the only "prime guide" in determining sovereign immunity. *See Hess*, 513 U.S. at 47.

The court of appeals' holding is in direct conflict with Pennsylvania law and well-settled precedent of the Pennsylvania Supreme Court which recognizes that Port Authority is an agency and arm of the Commonwealth of Pennsylvania that shares co-equally in the State's sovereign immunity. As a result, the court of appeals' holding conflicts with those Commonwealth decisions as well as the decisions of the Fourth, Ninth and District of Columbia Circuits which held that the Eleventh Amendment sovereign immunity of nearly identical state transportation agencies should be recognized by the federal courts.

The judgment and holding of the court of appeals is in error. Port Authority requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit and reverse its judgment.

THE COURT OF APPEALS MISCONSTRUED AND DISREGARDED THIS COURT'S PRECEDENTS AND INTENSIFIED A CIRCUIT CONFLICT BY DENYING ELEVENTH AMENDMENT IMMUNITY TO A STATE-CREATED GOVERNMENT TRANSPORTATION AGENCY RECOGNIZED AND FUNDED AS A STATE AGENCY UNDER PENNSYLVANIA LAW

Twelve years ago, this Court identified in *Hess* the two main purposes and goals served by state sovereign immunity: protection of State treasuries from federal judgments and according States dignity as sovereign entities in the nation's constitutional system. The historical antecedents of sovereign immunity relied upon the Eleventh Amendment to shield States from suit in federal court and protect State treasuries from federal judgments. *See, e.g., Hans v. Louisiana*, 134 U.S. 1 (1890). However, this Court recognized in *Hess* that, "current Eleventh Amendment jurisprudence emphasizes the integrity retained by each State in our federal system." *Hess*, 513 U.S. at 39. "The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Id.* (quoting *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). The States are therefore entitled to the dignity and respect due sovereigns and should not be haled into federal courts lightly. *Id.* Therefore, when indicia of sovereign immunity "point in different directions, the Eleventh Amendment's *twin reasons* for being remain our prime guide." *Id.* at 47 (emphasis added).

Since *Hess*, however, this Court acknowledged that although protection of State treasuries is an "important function" of sovereign immunity and the Eleventh Amendment, "the doctrine's central purpose is to 'accord the

States the respect owed them as' joint sovereigns." *FMC*, 535 U.S. at 743 (quoting *Puerto Rico Aqueduct*, 506 U.S. at 146). According States dignity and respect as joint sovereigns within the federal system is therefore the "preeminent purpose of state sovereign immunity." *Id.* at 760. Indeed, sovereign immunity may be warranted even where the judgment has no potential impact on the state treasury. *See Doe v. Regents of the University of California*, 519 U.S. 425, 429 (1997) (holding that the proper inquiry is into "the relationship between the State and the entity in question . . . [and] the nature of the entity created by state law"). The Eleventh Amendment "confirmed, rather than established, sovereign immunity as a constitutional principle." *Alden*, 527 U.S. at 728-29. Although sovereign immunity and Eleventh Amendment immunity are sometimes referred to interchangeably, the latter is only a subset of the former. Sovereign immunity therefore "derives not from the Eleventh Amendment but from the structure of the original Constitution itself." *Alden*, 527 U.S. at 728.

The primary focus of current Eleventh Amendment jurisprudence is preservation of the State's dignity interest by examining the nature of the entity and the State's regard for that entity under its laws. Where a State unequivocally creates, funds and regards an entity as an agency of state government exercising the State's powers and enjoying the State's immunities, it offends the dignity of that State to subject the agency to the threat of federal judgment. Port Authority is just such an agency.

THE COMMONWEALTH OF PENNSYLVANIA CONFERRED ITS SOVEREIGN IMMUNITY UPON PORT AUTHORITY AND PENNSYLVANIA'S COURTS RECOGNIZE PORT AUTHORITY AS AN AGENCY AND ARM OF THE STATE

Port Authority was created by an act of the Pennsylvania legislature, The Second Class Port Authority Act ("the Act"). The Act provides that Port Authority is "exercising the public powers of the Commonwealth as an *agency thereof.*" 55 PA. CON. STAT. § 553(a) (emphasis added). Pennsylvania's Supreme Court has found that "[i]n light of this plain statutory language, it would be impossible to conclude that [Port Authority] is anything other than an agency of the Commonwealth." *Marshall v. Port Authority of Allegheny County*, 568 A.2d 931, 934 (Pa. 1990). Port Authority therefore enjoys sovereign immunity under the Pennsylvania Sovereign Immunity Act, 42 PA. CON. STAT. § 8521, *et seq.*, equal to that of the Commonwealth of Pennsylvania. *See Marshall*, 568 A.2d at 934. The Sovereign Immunity Act expressly preserves the rights of the Commonwealth of Pennsylvania from federal jurisdiction under the Eleventh Amendment. 42 PA. CON. STAT. § 8521(b).

Pennsylvania's legislative and judicial declarations that Port Authority is an agent or arm of the Commonwealth are of primary importance to determining Port Authority's entitlement to sovereign immunity. The Pennsylvania Supreme Court holds that:

> It is important to note in this regard that the sovereign immunity provisions of the Judicial Code were enacted to insulate the ***Commonwealth and its agencies*** from liability except in certain specified circumstances so that state governmental assets are not subject to depletion through multiple lawsuits. Thus, in

> determining whether an entity is a Commonwealth agency for sovereign immunity purposes, ***the important factors to be considered are whether the entity was created by the state to perform a state function so that a judgment against it would, in essence, injure the state***.

James J. Gory Mechanical Contracting, Inc. v. Philadelphia Housing Authority, 855 A.2d 669, 677 (2004) (emphasis added). The exact same purposes and concerns warranting sovereign immunity under the Eleventh Amendment motivate Pennsylvania's determination of sovereign immunity under state law.

Pennsylvania's creation of Port Authority and Pennsylvania courts' recognition of the sovereign status of Port Authority are dispositive determinations that Port Authority is entitled to sovereign immunity under this Court's holdings in *FMC*, *Alden* and *Doe*. Pennsylvania created and structured the Port Authority as part of its sovereign government, extended its immunities to protect its operation and assets, and the Pennsylvania Supreme Court expressly recognizes Port Authority as part of the Commonwealth government. It offends the dignity of the Commonwealth of Pennsylvania as a joint sovereign in the federal system to disregard its legislative and judicial authority and subject Port Authority to suit in federal court.

In rejecting Port Authority's claim of sovereign immunity, the court of appeals rejected this Court's precedent and likewise rejected the very purposes and goals of sovereign immunity. The court of appeals held that Pennsylvania's creation of and relationship with Port Authority was only a mere "factor" to be considered. The Court did not discuss the respect accorded to States nor the dignity interest that States

maintain in the federal system. As a consequence, the central purpose of the Eleventh Amendment was completely ignored and does not appear anywhere in the court's opinion. The court of appeals truncated this Court's holding in *Hess* to omit any mention of the preeminent purpose of state sovereign immunity from its opinion. *See Opinion*, 4a-5a, n. 3 (stating that "the principal rationale behind the Eleventh Amendment—protection of the sovereignty of States through 'the prevention of federal-court judgments that must be paid out of a State's treasury,'—should 'remain our prime guide.'"). Based upon Pennsylvania's legislative and judicial recognition of Port Authority's co-equal sovereign status, the only conclusion can be that Port Authority is entitled to sovereign immunity as an agent and arm of the Commonwealth of Pennsylvania. The court of appeals' refusal to recognize Port Authority's sovereign status was plain error.

THE COURT OF APPEALS MISCONSTRUED *HESS* AND RENDERED JUDGMENT IN CONFLICT WITH OTHER CIRCUITS ON THE STATE FUNDING ISSUE

Instead of following the dictates of *Alden* and *FMC* regarding the primacy of Pennsylvania's dignity interest in acknowledging the sovereign immunity of Port Authority, the court of appeals merely applied one-half of the analysis proffered by this Court in *Hess* to determine the potential threat of a judgment against the Commonwealth's treasury. It fundamentally misconstrued the express holding of *Hess* and created a direct conflict with other courts of appeals' decisions on this same issue.

In order to protect the States' treasuries, this Court concluded in *Hess* that the proper inquiry is such that if expenditures of the enterprise exceed receipts—through

adverse judgments or otherwise—"is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise?" The result is that only "[w]hen the answer is 'No'—both legally and practically—then the Eleventh Amendment's core concern is not implicated." *Hess*, 513 U.S. at 51-52. With respect to the State treasury analysis, this Court enunciated a two-part test: a State's legal obligation to fund judgments ***or*** its practical obligation to do so. If either part is answered in the affirmative, then Eleventh Amendment immunity would be appropriate.

However, the government agency claiming sovereign immunity in *Hess* placed no burden upon its founding States, and the Court found that such financial independence militated against any finding that a federal judgment against it would affect any State's treasury. *Id.* at 46. The Court contrasted the financial independence of Trans-Hudson "with the situation of transit facilities that place heavy fiscal tolls on their founding States." *Id.* at 50. The Court noted that in *Alaska Cargo Transport, Inc. v. Alaska R. Corp.*, 5 F.3d 378 (9th Cir. 1993), "Eleventh Amendment immunity was afforded a thinly capitalized railroad that depends for its existence on a state-provided financial safety net of broad dimension." *Id.* (citation and quotation omitted). The *Hess* Court approvingly cited the conclusion reached in *Morris v. Washington Metropolitan Area Transit Authority*, 781 F.2d 218 (D.C. Cir. 1986):

> [W]here an agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries, common sense and the rationale of the Eleventh Amendment require that sovereign immunity attach to the agency.

Id., 781 F.2d at 227. The *Hess* Court endorsed the reasoning in *Morris* that "Eleventh Amendment immunity was accorded [a] system whose revenue short-fall [was] anticipated from the start, an enterprise constantly dependent on funds from the participating governments to meet its sizable operating deficits." *Id.* (citation omitted). This practical analysis of the financial and structural burden a transportation agency places upon its founding state is required to determine whether that agency enjoys sovereign immunity.

The court of appeals, like the district court, solely inquired as to the *legal effect* of any judgment on the treasury of the Commonwealth. No consideration whatsoever was given to the *practical effect* of any judgment as required by this Court in *Hess*. *Id.* at 51-52. The court of appeals' limited analysis only examined whether Pennsylvania was legally obligated to pay for judgments entered against the Port Authority, and finding that payment was not legally required, it rejected sovereign immunity. Even under the *Hess* standard—which has since been subsumed under the preservation and respect due to States as sovereign entities—the court of appeals analysis was incorrect. The court of appeals failed to analyze whether Pennsylvania would be practically obligated to pay a federal judgment against the Port Authority. In fact, it would.

Port Authority is funded by the Commonwealth through a dedicated stream of statewide sales and use tax revenue set by statute. Pennsylvania currently funds nearly sixty percent of Port Authority's operations. It is unquestioned that a federal judgment against Port Authority will result in an expenditure of Commonwealth funds. The court of appeals' rejection of Port Authority's claim to sovereign immunity directly contradicts the holdings of the Court of Appeals for the District of Columbia Circuit, *Morris*, *supra*, Ninth

Circuit, *Alaska Cargo*, *supra*, and the Fourth Circuit, *Ristow v. South Carolina Ports Authority*, 58 F.3d 1051 (4th Cir. 1995).

In all of those cases, the courts of appeals held that the state transportation agencies were entitled to sovereign immunity despite the fact that no state would be legally responsible for judgments entered against the agencies. In *Alaska Cargo* and *Ristow*, the States had even expressly disclaimed liability for any debts or judgments against the agencies. A bare, formal analysis of the type rejected by this Court in *Hess* was equally rejected by the courts of appeals. In *Ristow*, the Fourth Circuit considered the "practical effect of a putative Ristow judgment on the state treasury." *Id.*, 58 F.3d at 1053. The *Ristow* court observed that even though the State of South Carolina bore no responsibility for judgments against the Ports Authority, the Fourth Circuit found that the State's continued funding of the agency's operations was merely "the first frame of a continuing picture that shows the state immersing itself in the pecuniary affairs of the Ports Authority." *Id.* Overwhelming funding of the Ports Authority's operation led the *Ristow* court to hold that the Ports Authority "is not self-sufficient" and although "[i]t is true that a judgment against the Ports Authority cannot be legally enforced against the State . . . The practical effect of South Carolina's treatment of the fiscal affairs of the Ports Authority, however, definitively implicates the state treasury." *Id.*, 58 F.3d at 1054. The Fourth Circuit therefore concluded that rejection of Eleventh Amendment immunity in such a case "would ignore economic reality." *Id.*

The Third Circuit rejected this economic reality in denying sovereign immunity to Port Authority despite Pennsylvania's statutory funding of Port Authority's operations. It is

unquestionable that a judgment against Port Authority will have a direct and practical effect on the Commonwealth. State funds will be expended to pay any federal judgment against Port Authority. This is precisely the type of result that sovereign immunity and the Eleventh Amendment must prevent.

It is equally clear that the court of appeals' ruling offends the dignity of the Commonwealth of Pennsylvania by subjecting the agencies and arms of the State to judgment in federal court. Accordingly, this Court should issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit and reverse its judgment against Port Authority.

CONCLUSION

For the foregoing reasons, Port Authority of Allegheny County's Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX 1

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 05-3459

[Filed May 22, 2006]

DANIELLE STANGL;
YVETTE KOERNER,

v.

PORT AUTHORITY OF ALLEGHENY COUNTY;
WILLIAM MCARDLE,
Port Authority of Allegheny County,
Appellant.

Appeal from the United States District Court for the Western District of Pennsylvania. (D.C. Civil No. 02-cv-01184). District Judge: The Honorable David S. Cercone.

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Transportation Authority.

Before BARRY, SMITH and TASHIMA,* Circuit Judges.

OPINION

BARRY, Circuit Judge

In 2002, Danielle Stangl and Yvette Koerner initiated a lawsuit against the Port Authority of Allegheny County and the Port Authority Police Chief, William McArdle, alleging gender discrimination and retaliation. In May 2005, shortly before the case was scheduled to go to trial, the Port Authority filed a motion for summary judgment claiming that it was entitled to Eleventh Amendment immunity. The District Court denied the motion, finding that "the Port Authority is not an alter ego of the Commonwealth, and is not entitled to

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* The Honorable A. Wallace Tashima, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

immunity under the Eleventh Amendment."[1] (App. at 13.) The Port Authority appealed. We have jurisdiction under 28 U.S.C. § 1291,[2] and will affirm.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Subjects of any Foreign State." U.S. Const. amend. XI. Eleventh Amendment immunity is available to states, as well as to any entity that is considered an "arm of the state." *See*

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[1] The District Court held, in the alternative, that even if the Port Authority is entitled to Eleventh Amendment immunity, "then such immunity must be abrogated in this instance to remedy the alleged unconstitutional conduct that discriminates based upon gender." (App. at 15.) Because we agree that the Port Authority is not entitled to Eleventh Amendment immunity, we do not reach the abrogation issue.

[2] "Ordinarily we do not have appellate jurisdiction to review district court orders denying motions to dismiss or for summary judgment because there is no final order within the meaning of 28 U.S.C. § 1291." *Acierno v. Cloutier*, 40 F.3d 597, 606 (3d Cir.1994). We have jurisdiction over an order denying Eleventh Amendment immunity, however, because "the denial of a defense of sovereign immunity is immediately appealable under the collateral order doctrine." *Bell Atlantic-Pennsylvania, Inc. v. Pa. Pub. Util. Comm'n*, 273 F.3d 337, 343 (3d Cir.2001) (citing *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993)). As we have explained, "an order denying a defense of immunity is reviewable before trial because entitlement to 'immunity from federal claims encompasses not only immunity from liability, but also immunity from suit.'" *Acierno*, 40 F.3d at 606 (quoting *Brown v. Grabowski*, 922 F.2d 1097, 1105 (3d Cir.1990)).

Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). In *Fitchik v. New Jersey Transit Rail Operations*, 873 F.2d 655 (3d Cir.1989), we synthesized the factors to be considered when determining whether an entity is an arm of the state for Eleventh Amendment purposes. We articulated a three prong analysis, and directed district courts to consider the following questions:

> (1) Whether the money that would pay the judgment would come from the state (this includes three of the *Urbano [v. Board of Managers*, 415 F.2d 247 (3d Cir.1969)] factors-whether payment will come from the state's treasury, whether the agency has the money to satisfy the judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts);
>
> (2) The status of the agency under state law (this includes four factors-how state law treats the agency generally, whether the entity is separately incorporated, whether the agency can sue or be sued in its own right, and whether it is immune from state taxation); and
>
> (3) What degree of autonomy the agency has.

Id. at 659.[3]

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[3] For many years, we considered the first consideration to be "the most significant factor." *Id.* (quoting *Urbano*, 415 F.2d at 251). Recently, however, we held that we can "no longer ascribe primacy to this factor." *Benn v. First Judicial Dist. of Pa.*, 426 F.3d 233, 239 (3d Cir.2005). Accordingly, "[w]e now accord equal consideration to all three prongs of the analysis-payment from the state treasury, status under state law, and autonomy." *See Febres*

Here, the District Court found that the first and third factors weighed against immunity, while the second factor weighed slightly in favor of it. We need not reprise those findings. Suffice it to say that substantially for the reasons set forth in the District Court's well-reasoned opinion, we will affirm. *See Febres v. Camden Bd. of Educ.*, No. 05-1178, 2006 U.S.App. LEXIS 9687 (3d Cir. April 18, 2006).

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v. Camden Bd. of Educ., No. 05-1178, 2006 U.S.App. LEXIS 9687, at *5 (3d Cir. April 18, 2006). In close cases, however, where "indicators of immunity point in different directions," *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 47, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994), the Supreme Court dictates that "the principal rationale behind the Eleventh Amendment-protection of the sovereignty of states through 'the prevention of federal-court judgments that must be paid out of a State's treasury,'-should 'remain our prime guide.'" *Febres*, 2006 U.S.App. LEXIS 9687, at *5.

APPENDIX 2

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 05-3459

[Filed May 11, 2006]

DANIELLE STANGL and YVETTE KOERNER,	)
	)
v.	)
	)
PORT AUTHORITY OF ALLEGHENY COUNTY and WILLIAM MCARDLE, Port Authority of Allegheny County, Appellant..	)

APPEAL FROM THE UNITED STATES DISTINCT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 02-cv-01184)

District Judge: The Honorable David S. Cercone

Before: BARRY, SMITH and TASHIMA,*
Circuit Judges

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted on May 11, 2006.

After consideration of all contentions raised by appellant, it is ADJUDGED and ORDERED that the District Court's order be and hereby is affirmed. Costs taxed against appellant. All in accordance with this Opinion.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: 22 May 2006

* The Honorable A. Wallace Tashima, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

APPENDIX 3

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 02-1184

[Filed June 10, 2005]

DANIELLE STANGL and YVETTE KOERNER, Plaintiffs,	)
v.	)
PORT AUTHORITY OF ALLEGHENY COUNTY and WILLIAM MCARDLE, Defendants.	)

MEMORANDUM OPTION

I. INTRODUCTION

On or about July 3, 2002, Plaintiffs, Danielle Stangl ("Stangl") and Yvette Koerner ("Koerner") (collectively "Plaintiffs"), filed a three (3) count complaint against defendants, the Port Authority of Allegheny County (the "Port Authority") and Chief William McArdle ("McArdle")

(collectively "Defendants"). Plaintiffs allege: (a) violation of their rights to Equal Protection under the Fourteenth Amendment based upon gender discrimination[1]; (b) retaliation by Defendants for Plaintiffs' exercise of their rights under the First Amendment; and, (c) violation of Equal Pay Act and equal protection in wages & compensation.

By Memorandum Order dated February 14, 2005, this Court granted summary judgment with respect to Plaintiffs' First Amendment retaliation claim and denied summary judgment on Plaintiffs' claims based upon the Equal Protection Clause and the Equal Pay Act. Trial in this matter was scheduled for May 11, 2005. However, on the eve of trial, the Port Authority filed a motion for summary judgment contending that it is a "State" entity for purposes of Eleventh Amendment immunity and therefore, not subject to the jurisdiction of this Court. The Port Authority also argues that, because it is not subject to suit in federal court by virtue of the Eleventh Amendment, it is not a "person" within the meaning of the Title 42, United States Code Section 1983.

For the reasons set forth below, the Court finds the Port Authority's motion is without merit based upon the rulings of: (1) the Supreme Court of the United States in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994) and *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); and (2) the Court of Appeals for the Third Circuit in *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655 (3d Cir. 1989) and *Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d 807 (3d Cir. 1991).

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[1] Plaintiffs dropped their claim alleging a hostile work environment.

II. STATEMENT OF THE CASE

Stangl has been an employee of PAT's Transit Police and Security Department ("TPSD") since May of 2000. Stangl Affidavit ¶ 3. She was initially hired as a Transit Security Officer ("TSO"), and was promoted to her current position of Telecommunications Specialist ("dispatcher") in November of 2000. *Id.* Similarly, Koerner was hired by PAT as a TSO in January of 2000, and promoted to her current dispatcher position in September of 2000. Koerner Affidavit ¶ 3. McArdle has been the Chief of the TPSD for PAT since he was hired in August of 1993. McArdle Deposition, pp. 23-24, 26.

Plaintiffs contend that during their tenure, McArdle has hired several new transit police officers, all of whom are males. Complaint ¶ 11; Stangl Affidavit ¶ 5; Koerner Affidavit ¶ 5. Stangl, who has applied for every TPO opening, avers that she met the minimum qualifications for the position including: (a) a high school diploma or G.E.D.; (b) a valid Pennsylvania driver's license; (c) Act 120 certification; and (d) basic clerical skills. Stangl Affidavit ¶ 6. Koerner also applied for each such position and contends she met the minimum qualifications. Koerner Affidavit ¶ 6. The PAT and McArdle, however, passed them over for several male applicants that Plaintiffs contend had qualifications inferior to theirs. Complaint ¶ 11. Therefore, Plaintiffs argue that the PAT and McArdle have fostered a discriminatory system of hiring police officers in that only one (1) female police officer has been appointed while twenty-nine (29) male officers have been appointed in McArdle's nine (9) years of decision-making. Complaint ¶ 9.

The Port Authority contends that because a majority of its funding is provided by the Commonwealth of Pennsylvania

(the "Commonwealth"), it is a State entity under the Eleventh Amendment and therefore, immune from this federal law suit[2]. Specifically, the Port Authority avers that for the fiscal year 2005, it will receive approximately $211.2 million dollars of operating funding from the Commonwealth and local governments, of which $182.2 million is to be provided by the Commonwealth. *See* Declaration of Claudia Alien, ¶ 2. The Port Authority also expects to generate approximately $64.7 million of additional operating revenue. Declaration of Claudia Allen, ¶ 3. Based upon a gross operating budget of $303.3 million[3], the Port Authority claims that the Commonwealth provides 59.3 % of its funding. Declaration of Claudia Allen, ¶ 5. The Port Authority admits that it receives federal funding, however, it did not include the amount of such funding in its computation of the proportion of its total funding provided by the Commonwealth. *See* Declaration of Claudia Allen, ¶ 2. Obviously, if the federal funding is included in the calculation, the proportion of the total funding provided by the Commonwealth is an amount **less than** 59.3%

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[2] In a previous ruling by this Court involving the same defendant, the Court found that the Eleventh Amendment was not a jurisdictional bar to the federal action based upon the Third Circuit's ruling in *Bolden*. *See Pa. Coach Lines, Inc. v. Port Authority of Allegheny County*, 874 F. Supp. 666, 669 n.1 (W. D. Pa. 1994)

[3] The Port Authority reaches this figure by indicating that it will receive an additional $25.3 million from the Commonwealth for the current fiscal year, but does not include it in the 182.2 million also provided by the Commonwealth. Declaration of Claudia Allen, ¶ 5. By this Court's calculation, however, $211.2 million plus $64.7 million plus $25.3 million equals $301.2 million.

III.LEGAL STANDARD FOR SUMMARY JUDGMENT

Pursuant to FED. R. CIV. P 56(c), summary judgment shall be granted when there are no genuine issues of material fact in dispute and the movant is entitled to judgment as a matter of law. To support denial of summary judgment, an issue of fact in dispute must be both genuine and material, *i.e.*, one upon which a reasonable fact finder could base a verdict for the non-moving party and one which is essential to establishing the claim. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). When considering a motion for summary judgment, the court is not permitted to weigh the evidence or to make credibility determinations, but is limited to deciding whether there are any disputed issues and, if there are, whether they are both genuine and material. *Id.* The court's consideration of the facts must be in the light most favorable to the party opposing summary judgment and all reasonable inferences from the facts must be drawn in favor of that party as well. *Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177, 180 (3d Cir. 1999), *Tigg Corp. v. Dow Corning Corp.*, 822 F.2d 358, 361 (3d Cir. 1987).

When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. *See Matsushita Elec. Indus Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P 56(e). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 587.

IV. DISCUSSION

There is a long history of Third Circuit analysis of the application of the Eleventh Amendment to governmental and semi-governmental entities. *See e.g. Christy v. Pennsylvania Turnpike Comm'n,* 54 F.3d 1140 (3d Cir. 1995); *Bolden v. Southeastern Pa. Transp. Auth.,* 953 F.2d 807 (3d Cir. 1991); *Fitchik v. New Jersey Transit Rail Operations, Inc.,* 873 F.2d 655 (3d Cir.) *cert. denied,* 493 U.S. 850 (1989); *Port Auth. Police Benevolent Ass'n v. Port Auth. of N. Y. and N.J.,* 819 F.2d 413 (3d Cir.), *cert. denied* 484 U.S. 953 (1987); *Kovats v. Rutgers, The State Univ.,* 822 F.2d 1303 (3d Cir. 1987); *Blake v. Kline,* 612 F.2d 718 (3d Cir. 1979), *cert. denied,* 447 U.S. 921 (1980); *Urbano v. Board of Managers,* 415 F.2d 247 (3d Cir. 1969), *cert. denied,* 397 U.S. 948 (1970). In *Fitchik,* the Third Circuit held that the Eleventh Amendment did not apply to the agency created by the State of New Jersey to provide public transportation following the demise or decline of many of the privately owned railroads and bus companies serving the state. *See* N.J. STAT. ANN. § 27:25-1 *et seq.* Similarly, in *Bolden,* the court found that the Eleventh Amendment did not apply to the entity created by the Commonwealth to provide public transportation following the demise or decline of many of the privately owned transportation companies serving southeastern Pennsylvania. Despite these rulings, the Port Authority argues for expansion of the sovereign immunity doctrine, to the detriment of curtailing arbitrary government action, solely because the Commonwealth decided to increase funding[4].

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[4] Since 1890, the Supreme Court has held that counties and similar political subdivisions of the state are not entitled to Eleventh Amendment immunity, despite the fact that they exercise state power and receive significant amounts of money from the state.

The Third Circuit has formulated a specific and comprehensive test to determine whether Eleventh Amendment immunity extends to an entity:

> 'Local law and decisions defining the status and nature of the agency involved in its relation to the sovereign are factors to be considered, but only one of a number that are of significance. Among the other factors, no one of which is conclusive, perhaps the most important is whether, in the event plaintiff prevails, the payment of the judgment will have to be made out of the state treasury; significant here also is whether the agency has the funds or the power to satisfy the judgment. Other relevant factors are whether the agency is performing a governmental or proprietary function; whether it has been separately incorporated; the degree of autonomy over its operations; whether it has the power to sue and be sued and to enter into contracts; whether its property is immune from state taxation, and whether the sovereign has immunized itself from responsibility for the agency's operations.'

Urbano v. Board of Managers, 415 F.2d at 251-52.

In *Fitchik,* the court divided the *Urbano* factors into three larger questions as follows:

> (1) Whether the money that would pay the judgment would come from the state (this includes three of the *Urbano* factors -- whether payment will come from

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Fitchik v. New Jersey Transit Rail Operations, Inc., 873 F.2d at 661 n.3, *citing Lincoln County v. Luning,* 133 U.S. 529 (1890); *Workman v. New York;* 179 U.S. 552, 563-66 (1900) (holding that cities are not entitled to eleventh amendment immunity).

the state's treasury, whether the agency has the money to satisfy the judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts);

(2) The status of the agency trader state law (this includes four factors -- how state law treats the agency generally, whether the entity is separately incorporated, whether the agency can sue or be sued in its own right, and whether it is immune from state taxation); and

(3) What degree of autonomy the agency has.

Fitchik v. New Jersey Transit Rail Operations, Inc., 873 F.2d at 659. The Third Circuit has recognized that the most important question is whether a judgment would be payed out of the state treasury. *Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d at 816. Further, the Supreme Court found that the extent to which the state would be responsible for satisfying any judgment that might be entered against the defendant entity is the "most salient factor in Eleventh Amendment determinations." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994).

Several Courts of Appeals have also concluded that the state treasury factor is the most important factor to be considered, and have generally accorded this factor dispositive weight. *See, e. g., Baxter v. Vigo Cty. School Corp.*, 26 F.3d 728, 732-733 (7th Cir. 1994) (most significant factor is whether entity has power to raise its own funds); *Hutsell v. Sayre*, 5 F.3d 996, 999 (6th Cir. 1993), *cert. denied*, 510 U.S. 1119 (1994) ("The most important factor...is whether any monetary judgment would be paid out of the state treasury."); *Metcalf & Eddy, Inc. v. Puerto Rico*

Aqueduct and Sewer Authority, 991 F.2d 935, 942-943 (1st Cir. 1993) ("First, and most fundamentally, [the entity's] inability to tap the Commonwealth treasury or pledge the Commonwealth's credit leaves it unable to exercise the power of the purse. On this basis, [the entity] is ill-deserving of Eleventh Amendment protection."); *Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.*, 948 F.2d 1084, 1087 (CA8 1991) ("Because Missouri and Illinois are not liable for judgments against Bi-State, there is no policy reason for extending the states' sovereign immunity to Bi-State."); *Jacintoport Corp. v. Greater Baton Rouge Port Comm'n*, 762 F.2d 435, 4401 (5th Cir. 1985) *cert. denied*, 474 U.S. 1057 (1986) ("One of the most important goals of the immunity of the Eleventh Amendment is to shield states' treasuries....The purpose of the immunity therefore largely disappears when a judgment against the entity does not entail a judgment against the state."). *See also Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. at 48.

The Port Authority argues that because it receives its funding "predominately" from the Commonwealth, any judgment entered against it will be satisfied from these state funds. Further, because the Third Circuit finds this element most important in determining Eleventh Amendment immunity, the Port Authority argues that it is an alter ego of the Commonwealth for sovereign immunity purposes. The Port Authority emphasizes the Third Circuit's reliance upon the proportion of state funding in *Bolden* in rejecting SEPTA's entitlement to state sovereign immunity. Specifically, the Port Authority directs this Court to the Third Circuit's statement in *Bolden* that "only 27%[5] of [SEPTA's]

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[5] In *Fitchik*, the Third Circuit similarly relied on the fact that New Jersey provided "less that 33% of NJT's operating funds." *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d at 660.

revenues came from the state government." *Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d at 819. The Port Authority urges a different outcome here because the Commonwealth provides, by the Port Authority's calculation, approximately 60% of its funding[6]

The Port Authority's reliance upon the proportional share of funding provided by the Commonwealth is misguided. Though the Third Circuit gave weight to the proportion of funding provided, it also relied on the state's obligation to pay the entity's debts and/or judgments. In *Fitchik,* the court specifically weighed the fact that "New Jersey was under no obligation to pay NJT's debts or reimburse NJT for judgments that it pays. Indeed, New Jersey has specifically disclaimed any liability for NJT's debts." *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d at 661. In *Bolden,* the Third Circuit found that those words "equally apply to SEPTA....as [it] has 'no power...to pledge the credit or taxing power of the Commonwealth,' its obligations may not 'be deemed to be obligations of the Commonwealth'". *Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d at 819. Similarly, the Supreme Court in *Hess* gave great weight to the state's obligation for the entity's debts, stating:

> The proper focus is...on losses and debts. If the expenditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is 'No' -- both legally and practically -- then the Eleventh Amendment's core concern is not implicated.

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[6] It should be noted that, unlike the Port Authority, the *Bolden* court included federal funding in its calculation in determining the proportion of funding provided by the Commonwealth. *Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d at 819.

Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. at 51.

Based upon the above, this Court finds that the most telling factor is not the mere proportion of funding provided by the Commonwealth, but rather whether the Commonwealth is obligated to pay the judgment or any indebtedness of the Port Authority. Under Pennsylvania's Second Class County Port Authority Act, 55 PA. STAT. ANN. §§ 551 *et seq.*, the Commonwealth has no such obligation:

> An authority shall have no power, at any time or in any manner, to pledge the credit or taxing power of the Commonwealth of Pennsylvania or any political subdivision, nor shall any of its obligations be deemed to be obligations of the Commonwealth of Pennsylvania or of any of its political subdivisions, nor shall the Commonwealth of Pennsylvania or any political subdivision thereof be liable for the payment of principal or interest on such obligations.

55 PA. STAT. ANN. § 553(b)(18). To give too much weight to the mere proportion of funding would make Eleventh Amendment immunity dependent upon the whim of the state legislature. If the Commonwealth should decide to reduce funding in the next fiscal year, would the shield of the Eleventh Amendment then be removed for similarly situated plaintiffs seeking remedy in federal court for the Port Authority's constitutional wrongs? This would lead to inconsistent application of the sovereign immunity doctrine.

Moreover, the Third Circuit specifically addressed, and rejected, arguments for Eleventh Amendment immunity based upon increased state subsidies due to the inability of transportation authorities to pay potential shortfalls caused by judgments. Specifically, the court stated:

> Although [a state] might appropriate funds to [an authority] to meet any shortfall caused by judgments against [the authority], such voluntary payments by a state do not trigger [Eleventh Amendment] immunity.

Fitchik v. New Jersey Transit Rail Operations, Inc., 873 F.2d at 661. Further, in *Bolden*, the Third Circuit found:

> A state legislature might feel compelled as a practical matter to subsidize a variety of entities that provide necessary services, including financially pressed municipalities. Such discretionary subsidies committed in reaction to a judgment, however, would not necessarily transform the recipients into alter egos of the state.

Bolden v. Southeastern Pa. Transp. Auth., 953 F.2d at 819. This Court, therefore, finds that the most important of the factors, the funding factor, weighs against Eleventh Amendment immunity for the Port Authority.

Because the Port Authority is a similar entity to SEPTA, this Court adopts the Third Circuit's analysis in *Bolden* for the remaining two factors; the status of the Port Authority under state law elements and the Port Authority's degree of autonomy. Accordingly, the Court finds that the Port Authority is not an alter ego of the Commonwealth, and is not entitled to immunity under the Eleventh Amendment.

Notwithstanding the finding above, this Court questions whether the Port Authority would in fact be insulated by the Eleventh Amendment against the gender discrimination at issue here. Our Supreme Court has long held that Eleventh Amendment, and the principle of state sovereignty which it embodies, *see Hans v. Louisiana*, 134 U.S. 1 (1890), are

necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976), the Court held that Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment. *Fitzpatrick v. Bitzer,* 427 U.S. at 456. In Section 5, Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. This enforcement power is a broad power that includes "the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 81 (2000); see also *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 732 (1982), *citing Ex parte Virginia,* 100 U.S. 339, 346 (1880).

In *Ex parte Virginia,* The Supreme Court described the breadth of Congress' § 5 power as follows:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia 100 U.S. at 345-346. *See also City of Boerne v. Flores*, 521 U.S. 507, 517-518 (1997).

In *Fitzpatrick v. Bitzer;* the Supreme Court found a suit brought directly against a state government pursuant to Title VII of the Civil Rights Act of 1964, prohibiting employment discrimination, was not barred by the sovereign immunity afforded the state under the Eleventh Amendment. *Fitzpatrick v. Bitzer,* 427 U.S. at 450-456. Thereafter, the Court repeatedly affirmed that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nev. Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 727-728, (2003); *City of Boerne v. Flores,* 521 U.S. at 518.

The most recent affirmation of the breadth of Congress' § 5 power came in *Hibbs,* in which the Court considered whether a male state employee could recover money damages against the State for its failure to comply with the family-care leave provision of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601 *et seq.* The Court upheld the FMLA as a valid exercise of Congress' § 5 power to combat unconstitutional sex discrimination, even though there was no suggestion that the State's leave policy was adopted or applied with a discriminatory pro-pose that would render it unconstitutional under the rule of *Personnel Adm'r of Massachusetts v. Feeney,* 442 U.S. 256 (1979).

Congress responded to a history of gender discrimination by abrogating States' sovereign immunity in actions under Title VII and this abrogation was sustained in *Fitzpatrick, supra.* Moreover, there is no question that the alleged conduct of the Port Authority herein is proscribed by Title VII. Plaintiffs, however, failed to plea a cause of action

under Title VII.[7] Nevertheless, the Fourteenth Amendment guarantees the Plaintiffs Equal Protection of the laws which includes the right to be free from gender-based discrimination in the workplace. Therefore, insulating the alleged unlawful conduct of the Port Authority with Eleventh Amendment immunity because the Plaintiffs' failed to plead under Title VII would unfairly elevate form over substance, and treat these Plaintiffs differently than others similarly situated.

Accordingly, this Court also finds that if the Third Circuit finds that the Port Authority's argument for Eleventh Amendment immunity is not governed by the rulings of *Fitchik* mad *Bolden,* and falls within the protection of sovereign immunity, then such immunity must be abrogated in this instance to remedy the alleged unconstitutional conduct that discriminates based upon gender.

V. CONCLUSION

Based upon the foregoing, the Port Authority's motion for summary judgment based upon Eleventh Amendment immunity shall be denied.

An appropriate order follows.

Cercone, J.

[7] Plaintiff's motion to amend the complaint to include a claim under Title VII was denied because the statute of limitations for the filing of a Title VII claim had expired.

APPENDIX 4

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 02-1184

[Filed June 10, 2005]

DANIELLE STANGL and YVETTE KOERNER, Plaintiffs,	)
v.	)
PORT AUTHORITY OF ALLEGHENY COUNTY and WILLIAM MCARDLE, Defendants.	)

ORDER OF COURT

AND NOW, this 10th day of June, 2005, upon consideration of the Port Authority's Motion for Summary Judgment (**Document No. 111**), and Plaintiffs' response thereto,

IT IS HEREBY ORDERED that the motion for summary judgment is **DENIED**.

/s/ D. S. Cercone

David Stewart Cercone,
United States District Judge
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APPENDIX 5

Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

APPENDIX 6

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX 7

551. Legislative finding; declaration of policy

It is hereby determined and declared as a matter of legislative finding:

(1) That a greater utilization of the rivers in the Commonwealth is necessary for the increased commerce and prosperity of the people of the Commonwealth.

(2) The increased commerce and prosperity of the people of the Commonwealth require, in counties of the second class, more effective coordination of the combined facilities of water, rail, air and highway.

(3) That the expanding industrial activities of the Commonwealth require the planning, designing, construction, erection and operation of port facilities in counties of the second class.

(4) That property values in counties of the second class are threatened with irreparable loss for the lack of port facilities available to industry.

(5) The crisis in industrial transportation, which threatens the welfare of the Commonwealth, can be reduced by providing adequate port facilities.

(6) That in counties of the second class there has been and is an ever increasing growth in the industrial, commercial and residential areas, requiring adequate and modern facilities for

the mass transportation of passengers.

(7) That the existing transportation facilities are and have been unable to adequately serve the growing areas in counties of the second class, to the detriment of the health, safety and general welfare of the inhabitants.

(8) That the well being and economic health of the counties of the second class require an integrated system of mass passenger transportation.

(9) That it is desirable that the public transportation system be combined, improved, extended and supplemented by the creation of authorities as herein provided.

(10) That the establishment of a port authority will promote the public safety, convenience and welfare.

(11) That it is intended that the authority cooperate with and/or acquire existing transportation facilities, that private enterprise and government may mutually provide adequate port facilities for the convenience of the public.

(12) That it is intended that the authorities created hereunder will cooperate with all municipalities and other public bodies in which they operate so that the mass passenger transportation system may best serve the interests of the residents thereof.

Therefore, it is hereby declared to be the policy of the Commonwealth of Pennsylvania to promote the safety and welfare of the inhabitants thereof by the creation of a body corporate and politic for each second class county, to be known as The Port Authority of (insert name of county), which shall exist and operate for the purposes contained in

this act. Such purposes are hereby declared to be public uses for which public money may be spent and private property may be acquired by the exercise of the power of eminent domain.

§ 552. Definitions.

As used in this act:

(1) The term "authority" shall mean any body, politic and corporate, created by this act.

(2) The term "port district" shall mean all the territory within a second class county.

(3) The term "member" shall mean a member of the governing body of an authority.

(4) The term "board" shall mean the governing body of an authority.

(5) The term "bonds" shall mean and include the notes, bonds, refunding bonds, and other evidences of indebtedness or obligations which the authority is authorized to issue, pursuant to section five of this act.

(6) The term "construction" shall mean and include acquisition and construction, and the term "to construct" shall mean and include to acquire and to construct all in such manner as may be deemed desirable.

(7) The term "municipality" shall mean any county, city, town, borough or township of the Commonwealth of Pennsylvania, or any authority organized under any law of the Commonwealth of Pennsylvania.

(8) The term "Federal agency" shall mean and include the United States of America, the President of the United States and any department or corporation, agency or instrumentality, heretofore or hereafter created, designated or established by the United States of America.

(9) The term "improvement" shall mean and include extension, enlargement and improvement, and the term "to improve" shall mean and include to extend, to enlarge and to improve all in such manner as shall be deemed desirable.

(10) The term "persons" shall mean and include natural persons.

(11) The term "port terminal" shall include any marine, motor truck, railroad and air terminal, also any coal, grain, bulk liquids and lumber terminal and any union, freight and other terminals, used or to be used, in connection with the transportation or transfer of freight and equipment, materials and supplies.

(12) The term "port facility" shall include all real and personal property used in the operation of a port terminal, including, but without being limited to, wharves, piers, slips, ferries, docks, drydocks, ship repair yards, bulkheads, dock walls, basins, carfloats, float-bridges, dredging equipment, radio receiving and sending stations, grain or other storage elevators, warehouses, cold storage, tracks, yards, sheds, switches, connections, overhead appliances, bunker coal, oil and fresh water stations, railroads, motor trucks, floating elevators, airports, barges, scows or harbor craft of any kind, markets and every kind of terminal storage or supply depot, now in use or hereafter designed for use, to facilitate transportation and for the handling, storage, loading or unloading of freight at terminals, and equipment, materials

and supplies therefor.

(13) The term "transportation system" shall mean all property, real and personal, useful for the transportation of passengers for hire, including but not limited to power plants, substations, terminals, garages, bridges, tunnels, subways, monorails, railroad motive power, trains, railroad passengers cars, and equipment, belt conveyors, inclines, car barns, street cars, buses, rails, lines, poles, wires, off-street parking facilities, as well as the franchises, rights and licenses therefor, including rights to provide group and party services: Provided, That such term shall not include taxicabs or bus companies, the main purpose of which is the transportation of children to and from school.

(14) The term "facility" shall mean port facility and transportation system.

(15) The term "local authorities" shall mean the officers of a municipality, elected or appointed, authorized to consent to the use of the municipality's streets, highways, bridges and tunnels and to enter into agreements relative to such use with the port authority.

(16) The term "Public Utility Commission" shall mean the Public Utility Commission of the Commonwealth of Pennsylvania, created by the act of March 31, 1937 (P.L. 160).

(17) The term "service area" shall mean the entire county incorporating the authority and those portions of adjacent counties necessary to permit the authority (i) to acquire existing transportation systems, eighty per centum of whose revenue vehicle miles for the preceding calendar year are operated within the incorporating county; (ii) to acquire by

purchase only and not by exercise of the right of eminent domain other existing transportation systems or parts thereof which, in the authority's sole discretion, are required for the establishment of an integrated system; (iii) to establish transit service between points in the county incorporating the authority and points in the adjacent counties where no such service is at the time being rendered and which service the authority, in its sole discretion, has determined to be required: Provided, however, That no such service shall be established without the consent of the affected adjacent county nor without participation of such county in the payment of the cost of establishing and maintaining such service; and (iv) to establish rapid transit facilities over jointly used or exclusive fixed rights of way.

Words importing the singular number include the plural number and vice versa.

§ 553. Creation of port authorities; rights or powers

(a) There are hereby created bodies corporate and politic in counties of the second class, to be known as Port Authority of (insert name of county), which shall constitute public bodies corporate and politic; exercising the public powers of the Commonwealth as an agency thereof. Each authority shall be for the purpose of planning, acquiring, holding, constructing, improving, maintaining and operating, owning, leasing, either as lessor or lessee, port facilities within the port district, and a transportation system in the county by which it is incorporated and outside of the county to the extent necessary for (i) the establishment of an integrated system; (ii) the establishment of additional transit service where none at the time is being otherwise rendered; (iii) the establishment of rapid transit facilities over jointly used or exclusive fixed

rights of way and (iv) the rendering of all group and party services which can be provided by transportation systems subject to acquisition under this act pursuant to certificates of public convenience issued them by the Pennsylvania Public Utility Commission.

(b) Each authority is hereby granted and shall have and may exercise all powers necessary or convenient for the carrying out of the aforesaid purposes, including but without limiting the generality of the foregoing, the following rights or powers:

(1) To have perpetual existence.

(2) To sue and be sued, implead and be impleaded, complain and defend in all courts, to petition the Interstate Commerce Commission (or like body) or join in any proceeding before any such bodies or courts in any matter affecting the operation of any project of the authority.

(3) To adopt and use and alter at will a corporate seal.

(4) To establish a principal office and such other office or offices as may be necessary for the carrying on of its duties.

(5) To acquire, purchase, hold, lease, as lessee and use any franchise, property, real, personal or mixed, tangible or intangible, or any interest therein, necessary or desirable for carrying out the purposes of the authority, and to sell, lease as lessor, transfer and dispose of any property, or interest therein, at any time, required by it. In exercising the power granted by this subsection, the authority shall consider the same value factors as provided in section 7 of this act in determining compensation under the exercise of eminent domain.

(6) To acquire by purchase, lease, or otherwise, and to

construct, improve, maintain, repair and operate facilities.

(6.1) To construct, improve, maintain, repair and operate high-occupancy vehicle lanes that are incorporated into and are made part of an authority facility.

(7) To make by-laws for the management and regulation of its affairs.

(8) To appoint officers, agents, employes and servants, to serve at the pleasure of the board (except as may otherwise be provided in collective bargaining agreements) and to prescribe their duties and fix their compensation: Provided, however, That the authority may bind itself by contract to employ an executive director, a general manager or a combined executive director and general manager and not more than five other senior executive personnel but no such contract shall be for a period of more than five years.

(9) To fix, alter, charge and collect fares, rates, rentals and other charges for its facilities by zones or otherwise at reasonable rates to be determined exclusively by it, subject to appeal, as hereinafter provided, for the purpose of providing for the payment of the expenses of the authority, the acquisition, construction, improvement, repair, maintenance and operation of its facilities and properties, the payment of the principal and interest on its obligations, and to comply fully with the terms and provisions of any agreements made with the purchasers or holders of any such obligations. The authority shall determine by itself exclusively, the facilities to be operated by it and the services to be available to the public. Any person questioning the reasonableness of any rate or services fixed by an authority may bring suit against the authority in the court of common pleas of the county incorporating the authority. The court of common pleas shall

have exclusive jurisdiction to determine the reasonableness of fares, rates and other charges or services fixed, altered, charged or collected by an authority. The court shall make such order as to fares, rates and other charges or services as to it shall be just and proper. No suit or appeal shall act as a supersedeas. The court shall give priority to all such suits or appeals and no bond shall be required of any party instituting such action or appeal under the provisions of this section.

(10) To borrow money, make and issue negotiable notes, bonds, refunding bonds and other evidences of indebtedness or obligations of the authority, and to secure the payment of such bonds, or any part thereof, by pledge or deed of trust of all or any of its revenues, rentals and receipts, and to make such agreements with the purchasers or holders of such bonds or with others in connection with any such bonds, whether issued or to be issued as the authority shall deem advisable and in general, to provide for the security for said bonds and the rights of the holders thereof.

(11) To make contracts of every name and nature, and to execute all instruments necessary or convenient for the carrying on of its business. Without limiting the generality of the foregoing, the authority is authorized to enter into contracts for the purchase, lease, operation or management of facilities subject to the jurisdiction of the Interstate Commerce Commission.

(12) Without limitation of the foregoing, to borrow money and accept grants from and to enter into contracts, leases or other transactions with any Federal agency, Commonwealth of Pennsylvania, municipality or corporation.

(13) To have the power of eminent domain.

(14) To pledge, hypothecate, or otherwise encumber, all or any of the revenues or receipts of the authority as security for all or any of the obligations of the authority.

(15) To do all acts and things necessary for the promotion of its business, and the general welfare of the authority to carry out the powers granted to it by this act or any other acts.

(16) To enter into contracts with the Commonwealth of Pennsylvania, municipalities or corporations, on such terms as the authority shall deem proper for the use of any facility of the authority, and fixing the amount to be paid therefor.

(17) To enter into contracts of group insurance for the benefit of its employes, or to continue in existence any existing insurance and/or pension or retirement system and/or any other employe benefit arrangement covering employes of an acquired existing transportation system, and/or to set up a retirement or pension fund or any other employe benefit arrangement for such employes.

(18) An authority shall have no power, at any time or in any manner, to pledge the credit or taxing power of the Commonwealth of Pennsylvania or any political subdivision, nor shall any of its obligations be deemed to be obligations of the Commonwealth of Pennsylvania or of any of its political subdivisions, nor shall the Commonwealth of Pennsylvania or any political subdivision thereof be liable for the payment of principal or interest on such obligations.

(19) Private rights and property in the beds of existing public highways vacated in order to facilitate the purposes of the authority shall not be deemed destroyed or ousted by reason of such vacation, but shall be acquired or relocated by the authority in the same manner as other property.

(20) To have the right to use any public road, street, way, highway, bridge or tunnel for the operation of a transportation system within the service area of its integrated system as set forth in the authority's plan of integrated operation as provided in section 13.1 hereof: Provided, That in the case of street railway or trolley coach facilities or pole and wire facilities or overhead structures, such right shall not be exercised within the limits of any county, city, borough or township, without the consent of the local authorities thereof and/or the State Highway Department, which consent shall not be unreasonably withheld and cannot be conditioned upon the payment of any bridge tolls or license fees, notwithstanding any existing agreements with the predecessor company or individual; and to enter into agreements with and accept franchises and licenses from such cities, boroughs and townships for such use.

(21) To establish such carrier routes as it deems necessary for the efficient operation of the transportation system owned or otherwise acquired by it under the terms of this act, subject to any limitations herein provided for; and to alter and vary and discontinue such carrier routes at its discretion.

(22) To self insure or otherwise provide for the insurance of any property or operations of the authority against any risks or hazards.

(23) To lease property or contract for service, including managerial and operating service, whenever it can more efficiently and effectively serve the public by so doing, rather than conducting its own operations with its own property.

(24) To form plans for the improvement of mass transportation in order to promote the economic development

of the service area in which the authority operates; to make recommendations concerning mass transportation facilities which the authority does not own or operate; to make recommendations concerning throughways and arterial highway connections to the Department of Highways and to other appropriate governmental bodies; and otherwise to cooperate with all such governmental bodies.

(25) To enter into agreements with any public utility operating a railroad or any other transportation facility wholly or partially within the service area for the joint or exclusive use of any property of the authority or the public utility or the establishment of through routes over the rights of way of the public utility or the authority or the establishment of joint fares and transfer of passengers.

(26) To develop programs designed solely to advertise, promote and stimulate the development and use of its port facility and transportation system and to join and to authorize its agents, employes and servants to join national and local trade and professional organizations organized for the purpose of promoting the betterment of port facilities and transportation systems and the improvement of the efficiency of persons connected with or employed by port facilities and transportation systems.

(27) Notwithstanding any other provision of law, to contract with any third party for the allocation of liability for any and all claims, actions, suits or damages, whether for compensatory or punitive damages, arising against a third party or the authority in connection with any accident or incident related to the operations conducted by or on behalf of or authorized by the authority or a third party, on property owned by the authority or on property owned by a third party and adjacent to the authority's property. If a third party

asserts against the authority any claim relating to liability that the authority, pursuant to contract, has assumed, such claim may, to the extent provided in this clause, result in the imposition of liability on the authority, and the defense of sovereign immunity as provided in 42 Pa.C.S. Ch. 85 Subch. B (relating to actions against Commonwealth parties) shall not be raised by the authority in connection therewith. The aggregate of liability for all claims, actions, suits or damages, whether for compensatory or punitive damages, that may be asserted against and imposed upon such third party and which the authority, pursuant to such contract, has assumed shall not exceed the limits of the liability insurance coverage maintained by the authority in connection with such assumed obligations, which insurance coverage shall not be less than ten million dollars. The authority shall be entitled to obtain and maintain insurance coverage in amounts deemed by the authority to be necessary or desirable and to name such third party as an additional named insured on any insurance policies relating thereto.

§ 553.2. Audit requirements.

(a) In addition to any audits or financial statements required by the county, State or Federal Government, the authority shall be subject to the following performance audit requirements:

(1) at least once every four years, the Office of the Auditor General shall review the procedures and audit, settle and adjust the accounts of the authority; and

(2) at least once every eight years, the board shall engage an outside consultant to conduct a comprehensive management study of the entire operation of the authority, including

recommendations to improve the efficiency of services being provided.

(b) In no instance shall the same consultant be used for consecutive audits.

(c) The findings of both of the audits required by subsection (a) shall be made available to the public.

(d) This section shall not be construed to prohibit more frequent reviews of the books and accounts of the authority.

§ 553.4. Budget adoption by board

(a) Annually, the board shall adopt an operating budget for the ensuing fiscal year. The budget shall reflect as nearly as possible the estimated revenues, including governmental operating subsidies and expenses of the authority for the fiscal year for which the budget is prepared. The total expenses shall not exceed the revenues estimated as available for the fiscal year.

(b) The board may at any time make supplemental appropriations or revisions of the budget for any lawful purpose from funds on hand or estimated to be received within the fiscal year and not otherwise appropriated, or from funds received in excess of projections.

(c) Where the governmental operating subsidies received during the year are less than anticipated in the operating budget adopted by the board, the board shall adjust the level of total expenditures so that total expenditures do not exceed the revised level of anticipated revenues.

557.1. Eminent domain

The authority shall exercise its power of eminent domain in the manner prescribed by the provisions of Article XXVI. of the act of July 28, 1953 (P.L. 723), known as the "Second Class County Code," except as such provisions are in conflict with the provisions of this section: Provided, That no property owned or used by the United States, the Commonwealth of Pennsylvania, any political subdivision thereof, or any body politic and corporate organized as an "authority" under any law of the Commonwealth or by any agency of any of them, nor any property used by a public utility other than a transportation system, nor any common carrier subject to the jurisdiction of the Interstate Commerce Commission, nor any property used for burial purposes or places of public worship, shall be taken under the right of eminent domain.

In case the authority shall repeal any resolution passed or discontinue any proceeding taken with respect to the exercise of its right of eminent domain prior to the entry upon, taking, appropriation or injury to any property, the authority shall not thereafter be liable to pay any damages which have been or might have been assessed, but all costs and expenses upon any proceeding had thereon shall be paid by the authority together with any actual damage, loss or injury sustained by reason of such proceeding.

In ascertaining, assessing and determining the amount of compensation or damages to be paid by the authority, the board of viewers may determine every fact, matter or thing, which in its judgment does or may have any bearing on the fair amount of the compensation. The factors thus to be taken into account shall include, among other things, the gross annual revenue, the original cost of construction, with particular reference to the amount expended in existing and

useful permanent improvements, and with such consideration for the amount in market value of the owner's bonds and stocks, if the owner be a corporation, as to the board of viewers may seem just and fair; the probable earning capacity of the property under particular rates prescribed by statute or ordinance or other municipal contract or fixed by any regulatory body; and for the items of expenditures for obsolete equipment and construction as the circumstances and historical development of the properties may warrant. The reproduction cost of the property based upon the fair average price of materials, property and labor, and the development and going-concern value of such properties, facilities, and franchises, any element of delay under these proceedings, and other elements of value, shall be given such weight by the board of viewers as may, in its judgment, be just and right in each case, as in other matters involving the valuation of properties and facilities devoted to the public service and coming before the said board of viewers for determination. The determination of the board of viewers shall award compensation or damages to each owner separately, and, in case any owner is also the lessee of the properties, facilities and franchises of any other company whose properties, facilities or franchises are acquired or to be acquired hereunder, the total amount awarded with respect thereto shall be apportioned between the owner or owners of such properties, facilities and franchises and any person or persons, company or companies, having an interest therein by virtue of any such lease or series of leases, the purpose of this provision being that the gross amount of damages or compensations, ascertained and determined as hereinabove provided, shall be distributed among those rightfully entitled thereto in such manner as may be just and equitable, having in view their respective interests therein.

When the authority exercises its right of eminent domain, it shall, prior to taking possession of the property, pay into the court of common pleas of the county in which said authority is created in the manner to be provided by the rules of court, a sum equal to seventy-five per centum (75%) of the amount estimated by it as the damages which will result from such exercise. Upon such payment into court, the authority shall have the right to immediate possession of the property and the authority shall be relieved of all obligation to see to the application or distribution of said money paid into court. The court shall direct the payment of said sum of money to the person or persons entitled thereto upon petition and proof of such entitlement and upon such conditions, including the filing of a refunding bond, as the court shall, by general or special rule, provide.

Any payments made pursuant to this act shall be credited upon the award or verdict and final judgment, provided such award and judgment is in a greater amount. Any payment made in excess of the award and verdict and final judgment shall be refunded to the authority. Detention damages and interests on the award of damages shall be limited to the amount, if any, by which the amount of money paid into court, as hereinabove required, is less than the award or verdict and final judgment.

562. Exemption from taxes and assessments

The effectuation of the authorized purposes of any authority created under this act, shall and will be in all respects for the benefit of the people of the Commonwealth, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions; and since the authority will be performing essential government functions in effectuating such purposes, the authority shall not be required to pay any

taxes or assessments upon any property acquired or used by it for such purposes, or fee, bridge tolls or other charge imposed or authorized to be imposed by virtue of any law of the Commonwealth of Pennsylvania, except vehicle registration fees, liquid fuels taxes, fuel use taxes, gross receipts taxes imposed as an excise on the use of public highways, and tolls imposed by the Pennsylvania Turnpike Commission. In lieu of taxes or special assessments, the authority may agree to make payments to any municipality. The bonds issued by the authority, their transfer and the income therefrom, including any profits made on the sale therefrom, shall at all times be free from taxation, other than inheritance and estate taxation, within the Commonwealth of Pennsylvania.

§ 563.1. Study and plan of operation; referendum; options; Utility Commission's authority; authorities' jurisdiction, rights and duties; systems operating into, and existing in, service areas

The authority, immediately upon its organization, shall commence its study of an integrated system of mass transportation within the service area. Such study shall include, but not be limited to the estimated cost of acquisition of existing transportation systems, the development of facilities, the estimates of revenues and the financial feasibility of an integrated system of mass transportation. Thereafter, the authority shall prepare a plan of integrated operation showing the service area and the pattern of its integrated system. The plan of integrated operation shall be submitted for approval to the board of county commissioners of the county incorporating the authority, and simultaneously, the authority shall submit to the board of county commissioners the recommendation of the authority on the plan of integrated

operation, and a schedule disclosing estimated cost of acquisition of existing transportation systems, estimates of revenue and expenditures for the proposed plan of integrated operation, and the proposed method of financing the acquisition and the plan of integrated operation. The board of county commissioners shall advertise the fact that the plan of integrated operation has been submitted and is available for public inspection at least once each week for two consecutive weeks in a newspaper of general circulation in the county: Provided, That no action may be taken by the board of county commissioners until the plan of integrated operation has been on file in the office of the county commissioners and available for public inspection for a period of at least thirty days following the date of publication of the second notice. The board of county commissioners may approve or reject the plan of integrated operation as submitted or, at any time thereafter, direct the authority to revise the original plan of integrated operation. In the event of a revision of the original plan of integrated operation, such revised plan of integrated operation shall be resubmitted to the board of county commissioners and shall be acted upon in the same manner as herein provided in the case of the submission by the authority of the original plan of integrated operation. Prior to approving or rejecting the plan of integrated operation or revised plan of integrated operation, the board of county commissioners may submit the question of approval of such plan or revised plan of integrated operation for referendum at any general, municipal or primary election. In the event of a referendum, the question shall be submitted on the ballot or on voting machines in the manner provided by the election laws of the Commonwealth and shall be in substantially the following form:

Shall the board of county commissioners of .....
County approve the integrated plan of operation of a .... Yes

mass transportation system submitted under the provisions of the Second Class County Port Authority Act? No .....

The referendum on this question shall be governed in all respects by the election laws of the Commonwealth in so far as they are applicable. Upon final approval by the board of county commissioners, the original or revised plan of integrated operation shall be recorded in the office of the recorder of deeds of the county or counties affected thereby and a copy of said plan of integrated operation shall also be filed with the Pennsylvania Public Utility Commission. The authority shall, thereafter, have the right to make such changes in the pattern of its integrated system and its service area as it may deem proper, subject to appeal to the court of common pleas in the same manner as provided for in clause (9) of subsection (b) of section 3 of this act, by adopting an amendment to the plan of integrated operation or service area and filing and recording the same in the office of the recorder of deeds and with the Pennsylvania Public Utility Commission as above provided. The authority shall not have power to acquire by purchase, condemnation or otherwise, any existing transportation systems, or engage in the operation of a transportation system as provided under this act, until it has met the requirements for recording and filing of the plan of integrated operation as provided herein: Provided, however, That the authority may enter into option agreements with any existing transportation systems for the purchase, lease or operation thereof, subject to the final approval of the plan of integrated operation by the board of county commissioners: Provided further, That nothing in this section, including the foregoing proviso clause, shall prevent, limit, restrict or interfere with in any way an undertaking or joining by the authority of any demonstration, test or experimental project relevant to, and necessary for, the establishment of an

integrated transportation system or of any demonstration, test or experimental project that may be required, or advisable, to establish the feasibility of an integrated transportation system.

Upon the recording of the plan of integrated operation, any law to the contrary notwithstanding, the authority shall have exclusive jurisdiction with respect to all matters regarding [a] its transportation system within the service area as set forth in the plan of operation or as from time to time changed as in this section provided. The Public Utility Commission shall have no authority to grant certificates of public convenience for a transportation system within the service area of the authority or for the establishment of group and party rights to operate wholly within such service area. The Public Utility Commission shall continue to have jurisdiction, except as otherwise provided in this section, with respect to all matters regarding those transportation systems and group and party rights to operate into or out of said service area.

The authority shall have the exclusive right to operate a transportation system within the service area as set forth in the plan of integrated operation, except for those transportation systems, operating into the said service area from points outside of said area, which companies shall have the right to pick up and discharge passengers destined to and from the territory outside the said area but not the right to pick up and discharge passengers entirely within the service area. Said excepted transportation systems by agreement with the authority may arrange for the pick up and discharge of passengers within the said service area when, in the opinion of the authority, such privilege will serve the purpose for which the authority was created. The authority may, also by agreement with an existing transportation system now servicing the said service area, permit a continuation of such services where, in the opinion of the authority, such privilege

will serve the purpose for which the authority was created. In the event no such agreement is entered into between the excepted transportation systems and the authority prior to the authority commencing to operate a mass transportation system in the service area, the authority shall be liable for all direct and consequential damages for any loss in value of the remaining portions of the system arising from the loss of the right to pick up and discharge passengers entirely within the service area.

The authority shall, within two years after approval by the board of county commissioners and the recording and filing of the plan of integrated operation in the office of the recorder of deeds and with the Pennsylvania Public Utility Commission as hereinabove provided, acquire by purchase, lease or eminent domain, or shall enter into an operation contract with all transportation systems operating entirely within the county in which the authority is created or eighty per centum of whose revenue vehicle miles for the preceding calendar year are operated within said county, except those transportation systems subject to the jurisdiction of the Interstate Commerce Commission: Provided, That the court of common pleas of the county in which such authority is created may, upon cause shown, extend the two-year period hereinbefore mentioned: And provided, That if the authority shall at any time desire to abandon or change any portion of a transportation system outside the territorial limits of the county incorporating the authority, the approval for such abandonment or change must be secured by the authority from the Pennsylvania Public Utility Commission: And provided further, That all group and party services provided by the authority outside the service area under rights acquired by it pursuant to this act shall be subject to the regulation by the Pennsylvania Public Utility Commission.

APPENDIX 8

§ 8521. Sovereign immunity generally

(a) General rule.--Except as otherwise provided in this subchapter, no provision of this title shall constitute a waiver of sovereign immunity for the purpose of 1 Pa. C.S. § 2310 (relating to sovereign immunity reaffirmed; specific waiver) or otherwise.

(b) Federal courts.--Nothing contained in this subchapter shall be construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States.

APPENDIX 9

§ 1301. Definitions

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Asset maintenance costs." All vehicle maintenance expenses, nonvehicle maintenance expenses and materials and supplies used in the operation of local transportation organizations and transportation companies.

"Average fare." Total passenger revenue divided by the total number of fare- paying passengers. With regard to the calculation of average fare or base fare for the reimbursement of losses resulting from free service to senior citizens authorized by this part, the Department of Transportation shall not differentiate between bus services provided within an operating unit or division of any transit agency for any reason. Services funded under either the State urban or rural operating assistance programs will be considered separate operating units.

"Bus." A motor vehicle designed for carrying 15 or more passengers, exclusive of the driver, and used for the transportation of persons, and a motor vehicle, other than a taxicab, designed and used for the transportation of persons for compensation.

"Capital project." Any system of public passenger or public passenger and rail transportation, including, but not limited

to, any railway, street railway, subway, elevated and monorail passenger or passenger and rail rolling stock, including self-propelled and gallery cars, locomotives, passenger buses and wires, poles and equipment for the electrification of any of the foregoing, rails, tracks, roadbeds, guideways, elevated structures, buildings, stations, terminals, docks, shelters, airports and parking areas for use in connection with public passenger or public passenger and rail transportation systems, interconnecting lines and tunnels to provide passenger or passenger and rail service connections between transportation systems, transportation routes, corridors, and rights-of-way for any thereof (but not for public highways), signal and communication systems necessary or desirable for the construction, operation or improvement of the public passenger or passenger and rail transportation system involved, or any improvement of or overhaul of any vehicle, equipment or furnishings for any of the foregoing or any part, or fractional and undivided co-ownership or leasehold interest in any one or combination of any of the foregoing, that may be designated as a capital project by the secretary.

"Class 1 transit entity." A local transportation organization or transportation company operating 1,000 or more transit vehicles in the peak period.

"Class 2 transit entity." A local transportation organization or transportation company operating more than 300 but less than 1,000 transit vehicles in the peak period.

"Class 3 transit entity." A local transportation organization or transportation company operating 300 or less fixed-route transit vehicles in the peak period serving an urbanized area.

"Class 4 transit entity." Any local transportation organization or transportation company which serves a nonurbanized area

and, during the 1990- 1991 fiscal year, received or was approved to receive funding under the act of February 11, 1976 (P.L. 14, No. 10), known as the Pennsylvania Rural and Intercity Common Carrier Surface Transportation Assistance Act.

"Class 4 transit entity adjusted base grant." The State subsidy for operating expenses a Class 4 transit entity received during the 1990-1991 fiscal year, including any funds appropriated under the act of February 11, 1976 (P.L. 14, No. 10), known as the Pennsylvania Rural and Intercity Common Carrier Surface Transportation Assistance Act; adjusted for factors which, in the judgment of the department, caused significant increases or decreases in the amount of State subsidy to a Class 4 transit entity during the 1990-1991 fiscal year; and further adjusted, with respect to any Class 4 transit entity which received a State subsidy for less than the entire 1990-1991 fiscal year, to reflect the annual subsidy that Class 4 transit entity would have received during that fiscal year if it had received a State subsidy for that entire fiscal year.

"Community transportation programs." Programs eligible to be funded pursuant to section 1312 (relating to community transportation programs).

"Construction." The term includes acquisition as well as construction.

"Counties." The term includes any county.

"Department." The Department of Transportation of the Commonwealth.

"Equipment" and "furnishings." Any equipment and furnishings whatsoever as may be deemed desirable and required for a capital project and approved by the Department of Transportation for the use and occupancy of that capital

project. The terms include the installation of such equipment and furnishings.

"Federal agency." The United States of America, the President of the United States of America and any department of, or corporation, agency or instrumentality heretofore or hereafter created, designated or established by, the United States of America.

"Fixed-route public transportation services." Regularly scheduled transportation that is available to the general public and is provided according to published schedules along designated published routes with specified stopping points for the taking on and discharging of passengers, including public bus and commuter rail systems. The term does not include exclusive ride taxi service, charter or sightseeing services, nonpublic transportation or school bus or limousine services.

"Fund." The Public Transportation Assistance Fund.

"Improvement." Any extension, enlargement, equipping, furnishing, as well as any improvement.

"Local transportation organization." Any political subdivision or any mass transportation, port, redevelopment or airport authority now or hereafter organized under the Laws of Pennsylvania or pursuant to an interstate compact or otherwise empowered to render, contract for the rendering or assist in the rendering of transportation service in a limited area in the Commonwealth of Pennsylvania, even though it may also render or assist in rendering transportation service in adjacent states, or any nonprofit association of public transportation providers within this Commonwealth.

"Materials and supplies." Those categories of expenses contained in object class code 504 as specified in the National Urban Mass Transportation Statistics, 1989 Section 15 Annual Report, Report No. UMTA-IT-06-0352-90- 1.

"Municipality." Includes any city, borough, incorporated town or township.

"Nonurbanized area." Any area in this Commonwealth which does not fall within an area classified as "urbanized" by the United States Bureau of the Census of the United States Department of Commerce in the 1990 Census of Population or any area in this Commonwealth not classified as "urbanized" in any future decennial census of the United States.

"Nonvehicle maintenance expenses." The categories of costs associated with the inspection, maintenance and repair of assets other than vehicles, as specified in the National Urban Mass Transportation Statistics, 1989 Section 15 Annual Report, Report No. UMTA-IT-06-0352-90-1.

"Pennsylvania Mass Transit Statistical Report." The summary of selected financial and operating data concerning local transportation organizations and transportation companies for services in urbanized areas published annually by the Department of Transportation since the 1973-1974 fiscal year. The department shall publish the Pennsylvania Mass Transit Statistical Report on an annual basis, which report shall contain statistics with respect to the prior fiscal year, including those statistics needed for the department to make the calculations required pursuant to sections 1303 (relating to annual appropriation and computation of subsidy) and 1310 (relating to distribution of funding), and such other material as the department shall determine.

"Pennsylvania Rural and Small Urban Public Transportation Program Statistical Report." The summary of selected financial and operating data concerning rural and small urban local transportation organizations and transportation companies for services in nonurbanized areas published by the Department of Transportation. The department shall publish the Pennsylvania Rural and Small Urban Public Transportation Program Statistical Report on an annual basis, which report shall contain statistics with respect to the prior fiscal year, including those statistics needed for the department to make the calculations required pursuant to sections 1303 (relating to annual appropriation and computation of subsidy) and 1310 (relating to distribution of funding), and such other material as the department shall determine.

"Person." The term includes natural persons, firms, associations, corporations, business trusts, partnerships and public bodies, including local transportation organizations.

"Planning, development, research, rural expansion and department-initiated programs." Any program eligible to be funded pursuant to section 1313 (relating to additional programs).

"Project grant." The Commonwealth's share of the cost of carrying out the particular project, which cost may include costs incurred prior to the effective date of this part and which cost shall include an appropriate allowance for the administrative expenses involved in carrying out the project.

"Property." All property, real, personal or mixed, tangible or intangible, or any interest therein, including fractional and undivided co-ownership interests.

"Public highway." Every way or place, of whatever nature, open to the use of the public as a matter of right for purposes

of vehicular travel. Solely for the purpose of administering this part, the term shall not be deemed to include a bridge located wholly within this Commonwealth which is open to the use of the public for the purpose of vehicular traffic but which on March 15, 1964, was owned and maintained by a mass transportation or port authority and which comprises a part of the transportation system of the mass transportation or port authority.

"Revenue hours." The total amount of time, calculated in hours, during which vehicles of a Class 4 transit entity are in service and available for public use as reported with respect to the most recent fiscal year in the most recently issued Pennsylvania Rural and Small Urban Public Transportation Statistical Report.

"Revenue miles." The total number of in-service miles traveled by vehicles of a Class 4 transit entity as reported with respect to the most recent fiscal year in the most recently issued Pennsylvania Rural and Small Urban Public Transportation Statistical Report.

"Secretary." The Secretary of Transportation of the Commonwealth.

"Shared-ride public transportation services." Demand-responsive transportation that is available to the general public, operates on a nonfixed route basis and charges a fare to all riders. For transportation to be included in this definition the first fare-paying passengers to enter the public transportation vehicle must not refuse to share the vehicle with other passengers during a given trip. Services excluded under this definition are: exclusive ride taxi service; charter and sightseeing services; nonpublic transportation; school bus or limousine services.

"Transit vehicle." A self-propelled or electrically propelled vehicle designed for carrying 15 or more passengers, exclusive of the driver, other than a taxicab, designed and used for the transportation of persons for compensation, including, but not limited to, subway cars, trolleys, trackless trolleys and railroad passenger cars.

"Transportation company." Any person, firm or corporation rendering public passenger or public passenger and rail transportation service, with or without the rendering of other service, in this Commonwealth pursuant to common carrier authorization from the Pennsylvania Public Utility Commission or the Interstate Commerce Commission.

"Urban common carrier mass transportation." Transportation within an area that includes a municipality or other built-up place which is appropriate, in the judgment of the Department of Transportation, for a common carrier transportation system to serve commuters or others in the locality, taking into consideration the local patterns and trends of urban growth, by bus or rail or other conveyance, either publicly or privately owned, serving the general public. The term does not include school buses or charter or sightseeing service.

"Urban Mass Transportation Act of 1964." Public Law 88-365, 49 U.S.C. § 1601 et seq.

"Urbanized area." A portion of this Commonwealth classified as "urbanized" by the United States Bureau of the Census of the United States Department of Commerce in the 1990 Census of Population or any area in this Commonwealth classified as "urbanized" in any future decennial census of the United States.

"Vehicle hours." The total amount of time, calculated in hours, during which vehicles of a local transportation organization or transportation company are in service and available for public use, listed with respect to the most recent fiscal year reported in the most recently issued Pennsylvania Mass Transit Statistical Report.

"Vehicle maintenance expenses." The categories of costs associated with the inspection, maintenance and repair of vehicles as specified in the National Urban Mass Transportation Statistics, 1989 Section 15 Annual Report, Report No. UMTA-IT-06-0352-90-1.

"Vehicle miles." The total distance, calculated in miles, which is funded in whole or in part by this part, traveled by vehicles of a local transportation organization or transportation company listed with respect to the most recent fiscal year reported in the most recently issued Pennsylvania Mass Transit Statistical Report.

§ 1302. Program authorizations

The department is hereby authorized, within the limitations hereinafter provided, and is required where the provisions of section 1303 (relating to annual appropriation and computation of subsidy) apply:

(1) To undertake and to provide financial support for research, by contract or otherwise, concerning urban common carrier mass transportation.
(2) To make grants to municipalities, counties, or their instrumentalities, and to agencies and instrumentalities of the

Commonwealth to supplement Federal or local or Federal and local funds for use:

(i) For the purpose of studies, analysis, planning and development of programs for urban common carrier mass transportation service and facilities, and for the purpose of activities related to the planning, engineering and designing of specific projects which are a part of a comprehensive program, including, but not limited to, activities such as studies related to management, operations, capital requirements and economic feasibility, to the preparation of engineering and architectural surveys, plans and specifications and to other similar or related activities preliminary to and in preparation for the construction, acquisition or improved operation of urban common carrier mass transportation systems, facilities and equipment. State funding under this subparagraph shall not exceed five-sixths of the non-Federal share of the project costs.

(ii) To provide for research, development and demonstration projects in all phases of urban common carrier mass transportation, including the development, testing and demonstration of new facilities, equipment, techniques and methods, to assist in the solution of urban transportation problems, in the improvement of mass transportation service and the contribution of such service toward meeting total urban transportation needs at minimum cost. State funding under this subparagraph shall not exceed five-sixths of the non-Federal share of the project costs.

(iii) To assist in providing grants to continue necessary service to the public, to permit needed improvements in service which are not self-supporting, to permit service which may be socially desirable but economically unjustified, and otherwise for any purpose in furtherance of urban common carrier mass

transportation. The methodology for calculating the amount of the grant under this subparagraph shall be determined in accordance with section 1303. Each grant to a Class 1 transit entity, to a Class 2 transit entity or to a Class 3 transit entity made pursuant to this paragraph shall be matched by local or private funding in an amount not less than one-third of the total State grant made pursuant to section 1303(b). Any grants to Class 3 transit entities may, however, be matched by an amount not less than the amount of local or private funding which is specified in the State contract for the 1990-1991 fiscal year if the department shall have received a certification from such Class 3 transit entity that such lower level of local or private funding is adequate to prevent significant service reductions or passenger fare increases.

(3) To make grants to any transportation company or companies for use in providing necessary service to the public, to permit needed improvements in services which are not self-supporting, to permit services which may be socially desirable but economically unjustified, and otherwise for any purpose in furtherance of urban common carrier mass transportation. In view of the particular sensitivity of special instrumentalities and agencies of the Commonwealth created to serve or coordinate the local transportation needs of substantial metropolitan areas, no grant moneys may be used exclusively or principally in the local service area of any such agency or instrumentality in which a city or county of the first or second class has membership, except in accordance with a system of priorities agreed upon by the department and such agency or instrumentality. In the case of a grant where the moneys granted will be used for an activity to be conducted exclusively or principally within the local service areas of such agency or instrumentality, no grant moneys may be used except in accordance with agreements by the department and such agency or instrumentality with respect to such use. In the

case of a grant not falling within the scope of the preceding sentence but where moneys granted will be used both within and without the local service area of such agency or instrumentality, the grant shall require that the routes, schedules and fares applicable only within such service areas shall be those mutually agreed upon by the department and such agency or instrumentality. No agreement referred to in this paragraph shall impair, suspend, reduce, enlarge or extend or affect in any manner the powers of the Pennsylvania Public Utility Commission or the Interstate Commerce Commission otherwise applicable by law. Each grant to a Class 1 transit entity, to a Class 2 transit entity or to a Class 3 transit entity made pursuant to this paragraph shall be matched by local or private funding in an amount not less than one-third of the total State grant made pursuant to section 1303(b). Any grants to Class 3 transit entities may, however, be matched by an amount not less than the amount of local or private funding which is specified in the State contract for the 1990-1991 fiscal year if the department shall have received a certification from such Class 3 transit entity that such lower level of local or private funding is adequate to prevent significant service reductions and/or passenger fare increases.
(4) In connection with privately or locally assisted capital projects or capital projects financed with private or local and Federal funds, to make grants for approved capital projects to a local transportation organization or a transportation company, including the acquisition, construction, reconstruction and improvement of facilities and equipment, buses and other rolling stock, and other real or personal property, including land (but not public highways), needed for an efficient and coordinated mass transportation system for use, by operation, lease or otherwise, in urban common carrier mass transportation service and in coordinating such service with highway and other transportation. No capital project grant shall be made for the purpose of financing,

directly or indirectly, the acquisition of any interest in, or the purchase of any facilities or other property of, a private urban common carrier mass transportation company. Each capital project shall be based on a program or plan approved by the department. No capital project grant shall exceed five-sixths of the non-Federal share, subject, however, to the following specific exceptions:

(i) If two or more capital projects are combined for financing purposes, the amount of department funds used for any one of such projects may exceed five-sixths of the non-Federal share, provided that the total amount of department funds provided for all the projects so combined does not exceed five-sixths of the total non-Federal share of all of the projects so combined.
(ii) If a capital project is eligible to receive Federal financial assistance under the Urban Mass Transportation Act of 1964 and if the project application for such Federal financial assistance has been rejected or delayed because of a lack of Federal funds or if the normal amount of Federal grant cannot be provided because of a lack of Federal funds and if the department has determined that the capital project is essential and should proceed without delay, department funds for such capital project may be increased temporarily to finance the entire net project cost, with the requirement that, upon the availability of additional Federal funds and the making to the capital project of a new or an additional Federal grant, the amount of department funds in excess of five-sixths of the non-Federal share be refunded to the department or be applied as the department may direct to help meet the department's share of the cost of another project in which the department is a participant.

(iii) If a project is ineligible to receive Federal financial assistance under the Urban Mass Transportation Act of 1964 and if the department has determined that the project is

essential and should proceed without delay, the amount of department funds for such project shall be limited to an amount not to exceed one-half of the net project cost.

(5) To make grants from the State Lottery Fund in accordance with Chapter 7 of the act of August 14, 1991 (P.L. 342, No. 36), known as the Lottery Fund Preservation Act.

(6) To participate in a pooled bus acquisition program with transportation companies or local transportation organizations and the Federal Government for the purpose of making buses available to transportation companies or local transportation organizations for use in urban common carrier mass transportation service, in accordance with the following procedures:

(i) The department may apply to the Urban Mass Transportation Administration of the United States Department of Transportation for the Federal share of any pooled-bus acquisition project.

(ii) The department may, with the assistance of the Department of General Services or a special group comprised of representatives of the transportation companies or local transportation organizations within the Commonwealth, write specifications for and order buses on behalf of any number of transportation companies or local transportation organizations desiring bus acquisition under this program.

(iii) Before any order for buses is placed by the department with a manufacturer, the department shall secure written assurance from the Federal Government of the availability of Federal financial assistance for such bus acquisitions. The department shall also secure written obligations by the transportation companies or local transportation organizations

participating in such bus acquisitions that they will accept delivery of such buses at the appropriate time and will supply local funding in accordance with subparagraph (iv).

(iv) Funding for this program shall be: four-fifths Federal, one-sixth State and one-thirtieth from local sources; however, the local share of program costs may be advanced to the manufacturer by the Commonwealth at the time of purchase. Repayments to the Commonwealth of such advancements shall be considered as augmentations to the fund from which the funds were advanced. No part of the Federal share shall be advanced by the Commonwealth in anticipation of reimbursement.

(v) The Commonwealth may take title to and delivery of vehicles acquired pursuant to this program for eventual transfer to transportation companies or local transportation organizations.

(vi) All bus acquisitions under this program shall be made in accordance with a system of competitive bidding.

(vii) At its discretion, the department may organize and fund, with Commonwealth funds, postacquisition studies reasonably related to any pooled-bus acquisition made pursuant to this section, including, but not limited to, a vehicle inspection study at an appropriate interval or intervals following acquisition in order to monitor the condition of any vehicle purchased pursuant to this section.

§ 1303. Annual appropriation and computation of subsidy

(a) General rule.--Beginning with the 1991-1992 fiscal year, the Commonwealth shall annually determine the level of

appropriation for public transportation assistance, using the standards contained in this section, to sufficiently fund and to make fully operative section 1302(2)(iii) and (3) (relating to program authorizations).

(b) Distribution as grants.--The General Assembly shall annually make an appropriation to the department for distribution as grants to local transportation organizations and transportation companies. The total amount of moneys appropriated shall be distributed by the department as grants to local transportation organizations and transportation companies in accordance with the provisions of this section.

(c) Distribution formula.--The department shall distribute the total amount appropriated under subsection (b) in the following manner:

(1) The department shall calculate the Class 4 transit entity share for the fiscal year.

(2) The department shall then calculate the amount of grant due to each Class 4 transit entity as follows:

(i) From the Class 4 transit entity share, each Class 4 transit entity shall first receive an amount equal to 100% of its Class 4 transit entity adjusted base grant.

(ii) With respect to any portion of the Class 4 transit entity share remaining after each Class 4 transit entity receives an amount equal to 100% of its Class 4 transit entity adjusted base grant:

(A) Fifty percent of such excess shall be distributed to Class 4 transit entities based upon the percentage of the total amount of all Class 4 transit entity adjusted base grants given to Class

4 transit entities which a particular Class 4 transit entity received.

(B) Twenty-five percent of such excess shall be distributed to Class 4 transit entities based upon each transit entity's Class 4 revenue mile percentage. The actual amount received by each Class 4 transit entity under this clause shall be determined by multiplying a particular Class 4 transit entity's Class 4 revenue mile percentage times 25% of such excess of the Class 4 transit entity share.

(C) Twenty-five percent of such excess shall be distributed to Class 4 transit entities based upon each transit entity's Class 4 revenue hour percentage. The actual amount received by each Class 4 transit entity under this clause shall be determined by multiplying a particular Class 4 transit entity's Class 4 revenue hour percentage times 25% of such excess of the Class 4 transit entity share.

(3) All Class 4 transit entities may utilize all of the funds received pursuant to this section for any purpose in furtherance of public transportation. Each grant made to a Class 4 transit entity pursuant to this section shall, however, be matched by local or private funding in an amount not less than one-third of the total State grant made pursuant to subsection (c). Additionally, any grants to Class 4 transit entities may be matched by an amount not less than the amount of local or private funding which is specified in the State contract for the 1990-1991 fiscal year if the department shall have received a certification from such Class 4 transit entity that such lower level of local or private funding is adequate to prevent significant service reductions or passenger fare increases.

(4) The department shall calculate the Class 1 transit entity share, the Class 2 transit entity share and the Class 3 transit entity share for the fiscal year.

(5) The department shall then calculate the amount of grant due to each local transportation organization and transportation company as follows:

(i) Each Class 1 transit entity shall receive a prorata share of the Class 1 transit entity share. If there is only one Class 1 transit entity, it shall receive the entire Class 1 transit entity share.

(ii) Each Class 2 transit entity shall receive a prorata share of the Class 2 transit entity share. If there is only one Class 2 transit entity, it shall receive the entire Class 2 transit entity share.

(iii) Each Class 3 transit entity shall receive a portion of the Class 3 transit entity share calculated as follows:

(A) From the Class 3 transit entity share, each Class 3 transit entity shall first receive an amount equal to 100% of its Class 3 transit entity adjusted base grant.

(B) With respect to any portion of the Class 3 transit entity share remaining after each Class 3 transit entity receives an amount equal to 100% of its Class 3 transit entity adjusted base grant:

(I) Fifty percent of such excess shall be distributed to Class 3 transit entities based upon the percentage of all Class 3 transit entity adjusted base grants given to Class 3 transit entities which a particular Class 3 transit entity received.

(II) Twenty-five percent of such excess shall be distributed to Class 3 transit entities based upon each transit entity's Class 3 vehicle mile percentage. The actual amount received by each Class 3 transit entity under this subclause shall be determined by multiplying a particular Class 3 transit entity's Class 3 vehicle mile percentage times 25% of such excess of the Class 3 transit entity share.

(III) Twenty-five percent of such excess shall be distributed to Class 3 transit entities based upon each Class 3 transit entity's Class 3 operating revenue percentage. The actual amount received by each Class 3 transit entity under this subclause shall be determined by multiplying a particular Class 3 transit entity's Class 3 operating revenue percentage times 25% of such excess of the Class 3 transit entity share.

(6) On or about each July 1, October 1, January 1 and April 1 of each year commencing July 1, 1987, the department shall disburse 25% of the total annual amount due to each local transportation organization or transportation company calculated in accordance with this section.

(d) New organizations.--Should a new local transportation organization or transportation company be established and meet the criteria of a Class 1 transit entity, Class 2 transit entity, Class 3 transit entity or Class 4 transit entity as such criteria are set forth in section 1301 (relating to definitions), the department shall make an appropriate determination as to the level of grant to which such local transportation organization or transportation company shall be entitled. This determination shall include, but shall not be limited to, a determination as to an appropriate adjusted base grant for that local transportation organization or transportation company and a determination of appropriate adjustments to class percentages or transit entity shares.

(e) Change to different entity class.--If, during any fiscal year, either the number of vehicles operated by a local transportation organization or transportation company or the area served by such a local transportation organization or transportation company changes so that the local transportation organization or transportation company meets the criteria for a different transit entity class, as such criteria are set forth in section 1301, on or before July 15 of the fiscal year which follows such a change and in each fiscal year thereafter, the department shall reflect any change in the transit entity class of such a local transportation organization or transportation company in its calculation of the transit entity shares for each transit entity class for that and subsequent fiscal years. In its calculation of the transit entity shares for each transit entity class required by this section, for the fiscal year following the change in a local transportation organization or transportation company's transit entity class and thereafter, the department shall include the amount of the transit entity share allocated to such a local transportation organization or transportation company for the fiscal year prior to the change in the transit entity class, in the transit entity share for the new transit entity class of such a local transportation organization or transportation company, and shall delete an equal amount from the transit entity share for the transit entity class for which such a local transportation organization or transportation company no longer meets the criteria in the new fiscal year or thereafter.

(f) Rates, fares and charges.–

(1) Each local transportation organization or transportation company receiving moneys pursuant to this section shall annually fix such rates, fares and charges in such manner that they shall be at all times sufficient in the aggregate, and in conjunction with any moneys received from Federal or other

sources, and any other income available to such organization or company, to provide funds for the payment of all operating costs and expenses which shall be incurred by such organization or company.

(2) In order to be eligible for the moneys described in paragraph (1), each local transportation organization or transportation company shall adopt an annual operating budget for each fiscal year no later than the last day of the preceding fiscal year. A copy of this operating budget shall be submitted to the department within ten days after its approval, along with a certification by the local transportation organization or transportation company that adequate revenues (including subsidies) are provided to support operating costs and expenses.

(g) Standards and measures.--

(1) Within one year after the effective date of this part and every year thereafter, each local transportation organization or transportation company receiving moneys pursuant to this section shall adopt a series of service standards and performance evaluation measures. Such standards and measures shall be in addition to the performance audits required by section 1315 (relating to public transportation grants management accountability) and shall consist of objectives and specific numeric performance levels to be achieved in meeting these standards and objectives. Those standards and measures adopted shall include the following, in addition to others deemed appropriate by the local transportation organization or transportation company:

(i) An automatic mechanism to review the utilization of routes.

(ii) Staffing ratios (ratio of administrative employees to operating employees; number of vehicles per mechanic).

(iii) Productivity measures (vehicle miles per employee; passenger and employee accidents per 100,000 vehicle miles; on-time performance; miles between road calls).

(iv) Fiscal indicators (operating cost per passenger; subsidy per passenger and operating ratio).

(iv.1) Reasonable minimum prequalification standards for prospective transit service subcontractors.

(v) Any other matter desired by the governing body of such local transportation organization or transportation company.

(2) The service standards and performance evaluation measures shall be established by formal action of the governing body of such local transportation organization or transportation company following an opportunity for comment by the public and the department. Upon submission, the department will review and may make recommendations to the local transportation organization or transportation company concerning the service standards and performance evaluation measures.

(3) In the discretion of such governing body, the service standards and performance evaluation measures may be systemwide or based on a sampling.

(4) The service standards and performance evaluation measures shall only constitute goals for such local transportation organization or transportation company in providing service in the year following their adoption. At the end of such year, fiscal or calendar, as the case may be, a

report shall be transmitted to the department for its consideration indicating the projected performance levels and the performance levels actually achieved. Upon submission, the department will review the report and may make recommendations to such local transportation organization or transportation company concerning the performance levels actually achieved. Such report shall be released to the public at the time of issuance.

(5) The department may suspend the eligibility for future discretionary transit grant funds of any transit entity which fails to comply with the provisions of this section. The department shall restore the discretionary funding eligibility of a suspended transit entity at such time as the requirements of this section are met in an amended application received by the department.

(h) Reduction of certain grants.--With respect to grants to Class 1 transit entities and Class 2 transit entities in any fiscal year, the department shall reduce the grant amount due to such local transportation organization or transportation company by an amount equal to 1% of such grant moneys otherwise due to such local transportation organization or transportation company for each percentage point such local transportation organization's or transportation company's operating ratio is less than 50% in the case of a Class 1 transit entity or less than 46% in the case of a Class 2 transit entity.

(i) Audits.--The department is authorized to perform independent financial audits of the financial statements of each local transportation organization or transportation company receiving moneys pursuant to this section. Such audits shall be conducted in accordance with generally accepted auditing standards. Any financial statements subject to such audit or reports resulting from such audit shall be prepared and

presented in accordance with generally accepted accounting principles, consistently applied with previous statements rendered for or on behalf of such organization or company. The department may coordinate such audits in conjunction with audits undertaken by the Auditor General.

(j) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Class 1 percentage." Seventy percent.

"Class 2 percentage." Twenty-five and three-tenths percent.

"Class 3 percentage." Four and seven-tenths percent.

"Class 1 to 3 allocation." The total amount appropriated under subsection (b) less the Class 4 transit entity share.

"Class 1 transit entity share." The product of the Class 1 percentage times the Class 1 to 3 allocation in a particular fiscal year.

"Class 2 transit entity share." The product of the Class 2 percentage times the Class 1 to 3 allocation in a particular fiscal year.

"Class 3 transit entity adjusted base grant." The State subsidy which a Class 3 transit entity received during the 1990-1991 fiscal year, including Federal funds transferred from other local transportation organizations and transportation companies from the Federal fiscal year 1989-1990 pursuant to the Governor's apportionment allocation contained in the Urban Mass Transportation Act of 1964.

"Class 3 transit entity share." The product of the Class 3

percentage times the Class 1 to 3 allocation in a particular fiscal year.

"Class 3 vehicle mile percentage." The percentage determined by dividing the vehicle miles of a Class 3 transit entity with respect to the most recent fiscal year as reported in the most recently issued Pennsylvania Mass Transit Statistical Report by the total number of vehicle miles of all Class 3 transit entities with respect to the most recent fiscal year as reported in the most recently issued Pennsylvania Mass Transit Statistical Report.

"Class 4 revenue hour percentage." The percentage determined by dividing the revenue hours of a Class 4 transit entity as reported with respect to the most recent fiscal year in the most recently issued Pennsylvania Rural and Small Urban Public Transportation Statistical Report by the total number of revenue hours of all Class 4 transit entities as reported with respect to the most recent fiscal year reported in the most recently issued Pennsylvania Rural and Small Urban Public Transportation Statistical Report.

"Class 4 revenue mile percentage." The percentage determined by dividing the revenue miles of a Class 4 transit entity as reported with respect to the most recent fiscal year in the most recently issued Pennsylvania Rural and Small Urban Public Transportation Statistical Report by the total revenue miles of all Class 4 transit entities as reported with respect to the most recent fiscal year reported in the most recently issued Pennsylvania Rural and Small Urban Public Transportation Statistical Report.

"Class 4 transit entity share." Two million three hundred thirty-five thousand dollars for the 1991-1992 fiscal year and, during the 1992-1993 fiscal year and each fiscal year

thereafter, shall mean the Class 4 transit entity share for the prior fiscal year plus (or minus) the product of the Class 4 transit entity share for the prior fiscal year times the percentage increase or decrease in the total operating assistance made available to local transportation organizations and transportation companies for that fiscal year as compared with the most recently completed fiscal year.

"Operating ratio." The proportion of total operating revenue (which shall include all passenger, charter and advertising revenue, fare reimbursement received from the State Lottery Fund and all other receipts associated with the delivery of transit services, but shall exclude Federal grants provided to cover operating losses and State grants made pursuant to subsection (b)) divided by total operating expenses associated with day-to-day operation of the system (but excluding depreciation of capital assets).

"Operating revenue." The total revenue earned by a local transportation organization or transportation company through its transit operations, including, but not limited to, passenger revenue, senior citizen grant, charter revenue, school contract revenue, advertising and other revenue listed with respect to the most recent fiscal year reported in the most recently issued Pennsylvania Mass Transit Statistical Report.

"Operating revenue percentage." The percentage determined by dividing the operating revenues of a local transportation organization or transportation company as reported in the most recently issued Pennsylvania Mass Transit Statistical Report by the total operating revenue of all local transportation organizations or transportation companies as reported in the most recently issued Pennsylvania Mass Transit Statistical Report.

§ 1304. Grant proposals

(a) General rule.--Grants may be made hereunder with reference to any appropriate project irrespective of when it was first commenced or considered and regardless of whether costs with respect thereto shall have been incurred prior to the time the grant is applied for or made.

(b) Applications.--The governing bodies of municipalities, counties or their instrumentalities, and agencies and instrumentalities of the Commonwealth may, by formal resolution, apply and transportation companies by application may apply to the department for State grant funds provided by this chapter. If the action is taken by a governing body, a certified copy of the resolution and, in the case of transportation companies, an application shall be forwarded to the department with a proposal of the governing body or company, which shall set forth the use to be made of State grant funds and the amount of funds required or, in the case of grants under section 1303 (relating to annual appropriation and computation of subsidy), which shall set forth a request that the grant provided for under section 1303 be made.

(c) Preference for coordinated systems.--The department shall give preference to any proposal which will assist in carrying out a plan, meeting criteria established by the department, for a unified or officially coordinated urban transportation system as a part of the comprehensively planned development of the urban area, which is necessary for the sound, economic and desirable development of such area and which shall encourage to the maximum extent feasible the participation of private enterprise. This subsection shall not apply to grants made pursuant to section 1303.

(d) Use of grants.--The use of the State grant funds shall be

for the purposes set forth in section 1302 (relating to program authorizations) and, without limiting the generality of the foregoing, may be used for local contributions required by the Urban Mass Transportation Act of 1964 or other Federal law concerning common carrier mass transportation.

(e) Grant agreement.--

(1) The department shall review the proposal and, if satisfied that the proposal is in accordance with the purposes of this chapter, shall enter into a grant agreement subject to the condition that the grant be used in accordance with the terms of the proposal. With respect to grants made pursuant to section 1303, the department shall make such grants subject to the condition that the grants be used for the purposes set forth in section 1302 and, where applicable, only after the certification required in section 1302(2)(iii) and (3) shall have been made.

(2) The time of payment of the grant and any conditions concerning such payment shall be set forth in the grant agreement.

§ 1305. Rules and regulations

In order to effectuate and enforce the provisions of this chapter, the department is authorized to promulgate necessary rules and regulations and prescribe conditions and procedures in order to assure compliance in carrying out the purposes for which grants may be made hereunder.

§ 1306. Cooperation with other governments and private interests

(a) General rule.--The department is directed to administer this program with such flexibility as to permit full cooperation between Federal, State and local governments, agencies and instrumentalities, as well as private interests, so as to result in as effective and economical a program as possible.

(b) Agreements.--The department is hereby authorized to enter into agreements providing for mutual cooperation between or among it and any Federal agency, local transportation organization or transportation company concerning any or all projects, including joint applications for Federal grants.

§ 1307. General authority of department

It is the purpose and intent of this chapter to authorize the department to do any and all other things necessary or desirable to secure the financial aid or cooperation of any Federal agency in any of the department's projects and to do and perform all things which may be required by any statute of the United States of America or by the lawful requirements of any Federal agency authorized to administer any program of Federal aid to transportation. The department is expressly permitted to enter into protective agreements with labor to the extent required under 49 U.S.C. § 5333 (relating to labor standards) in order to obtain Federal grant moneys for transportation assistance. Such protective agreements shall be narrowly drawn and strictly construed to provide no more than the minimum protections required by the United States Department of Labor for such agreements.

§ 1308. Grants by counties or municipalities

Any county or municipality in any metropolitan area which is a member of a local transportation organization is authorized to make annual grants from current revenues to local transportation organizations to assist in defraying the costs of operations, maintenance and debt service of local transportation organization or of a particular mass transportation project of a local transportation organization and to enter into long-term agreements providing for the payment of the same. The obligation of a municipality or county under any such agreement shall not be considered to be a part of its indebtedness, nor shall such obligation be deemed to impair the status of any indebtedness of such municipality or county which would otherwise be considered as self-sustaining.

§ 1309. Limitation on decisions, findings and regulations of department

All decisions, findings and regulations made by the department pursuant to this chapter shall be for the purposes of this chapter only and shall not constitute evidence before any regulatory body of this Commonwealth or any other jurisdiction.

§ 1310. Distribution of funding

(a) General rule.--All moneys made available and required to be used for capital projects, asset maintenance and other programs specified in this section shall be distributed in accordance with the formula specified in this section and used

strictly in accordance with section 1311 (relating to use of funds distributed).

(b) Distribution procedure.--During each fiscal year, capital project, asset maintenance and other program funds shall be distributed as follows:

(1) On or before the fifth day of each month, the Treasury Department shall certify to the department the total amount then available for distribution, and the department shall make distribution of payments required under this subsection on or before the 20th day of each month.

(2) Beginning in the 1991-1992 fiscal year, each month, the Treasury Department shall pay one-twelfth of the Department of Transportation project management oversight share for that fiscal year into the General Fund. The moneys so transferred are hereby appropriated to the Department of Transportation for use by that department for expenses related to project management and oversight of capital and asset maintenance projects funded pursuant to this section.

(3) Each month, the Treasury Department shall pay one-twelfth of the community transportation program section 1310 share for that fiscal year into the General Fund. The funds so transferred are hereby appropriated to the Department of Transportation to make grants to counties, pursuant to section 1312 (relating to community transportation programs), for the purpose of funding capital projects of community transportation programs.

(4) Each month, the Treasury Department shall pay the planning, development, research, rural expansion and department-initiated programs section 1310 share for that month into the General Fund. The funds so transferred are

hereby appropriated to the Department of Transportation to incur costs directly or to make grants to local transportation organizations or transportation companies, or entities which seek to become local transportation organizations or transportation companies, pursuant to section 1312, for the purpose of funding planning, development, research, rural expansion and department-initiated programs.

(5) Each month, the department shall distribute one-twelfth of the Class 4 transit entity section 1310 share to Class 4 transit entities in the manner provided in this paragraph. Each Class 4 transit entity shall receive a portion of each monthly distribution of the Class 4 transit entity section 1310 share as follows:

(i) Fifty percent of the monthly distribution of the Class 4 transit entity section 1310 share shall be distributed to Class 4 transit entities based upon each transit entity's Class 4 operating assistance grant section 1310 percentage. The actual amount received by each Class 4 transit entity under this subparagraph shall be determined by multiplying a particular Class 4 transit entity's Class 4 operating assistance grant section 1310 percentage times the total amount available for distribution under this subparagraph.

(ii) Twenty-five percent of the monthly distribution of the Class 4 transit entity section 1310 share shall be distributed to Class 4 transit entities based upon each transit entity's Class 4 revenue mile section 1310 percentage. The actual amount received by each Class 4 transit entity under this subparagraph shall be determined by multiplying a particular Class 4 transit entity's Class 4 revenue mile section 1310 percentage times the total amount available for distribution under this subparagraph.

(iii) Twenty-five percent of the monthly distribution of the Class 4 transit entity section 1310 share shall be distributed to Class 4 transit entities based upon each transit entity's Class 4 revenue hour section 1310 percentage. The actual amount received by each Class 4 transit entity under this subparagraph shall be determined by multiplying a particular Class 4 transit entity's Class 4 transit entity revenue hour section 1310 percentage times the total amount available for distribution under this subparagraph.

(6) Each month, after providing for payment of the portion of the Department of Transportation project management oversight share, the community transportation program section 1310 share, the planning, development, research, rural expansion and department-initiated programs section 1310 shares and the Class 4 transit entity section 1310 share to be distributed that month, the department shall distribute all remaining capital project, asset maintenance and other program funds as follows:

(i) Each Class 1 transit entity shall receive a prorata share of the Class 1 transit entity section 1310 share. If there is only one Class 1 transit entity, it shall receive the entire Class 1 transit entity section 1310 share.

(ii) Each Class 2 transit entity shall receive a prorata share of the Class 2 transit entity section 1310 share. If there is only one Class 2 transit entity, it shall receive the entire Class 2 transit entity section 1310 share.

(iii) Each Class 3 transit entity shall receive a portion of the Class 3 transit entity section 1310 share as follows:

(A) Sixteen and sixty-seven hundredths percent of the Class 3 transit entity section 1310 share shall be distributed to Class

3 transit entities based upon each transit entity's Class 3 vehicle mile section 1310 percentage. The actual amount received by each Class 3 transit entity under this clause shall be determined by multiplying a particular Class 3 transit entity's Class 3 vehicle mile section 1310 percentage times the total amount available for distribution under this clause.

(B) Sixteen and sixty-seven hundredths percent of the Class 3 transit entity section 1310 share shall be distributed to Class 3 transit entities based upon each transit entity's Class 3 vehicle hour section 1310 percentage. The actual amount received by each Class 3 transit entity under this clause shall be determined by multiplying a particular Class 3 transit entity's Class 3 vehicle hour section 1310 percentage times the total amount available for distribution under this clause.

(C) Sixteen and sixty-six hundredths percent of the Class 3 transit entity section 1310 share shall be distributed to Class 3 transit entities based upon each transit entity's Class 3 total passenger section 1310 percentage. The actual amount received by each Class 3 transit entity under this clause shall be determined by multiplying a particular Class 3 transit entity's Class 3 total passenger section 1310 percentage times the total amount available for distribution under this clause.
(D) Twenty-five percent of the Class 3 transit entity section 1310 share shall be distributed to Class 3 transit entities based upon each transit entity's Class 3 Federal operating cap percentage. The actual amount received by each Class 3 transit entity under this clause shall be determined by multiplying a particular Class 3 transit entity's Class 3 Federal operating cap percentage times the total amount available for distribution under this clause.

(E) Twenty-five percent of the Class 3 transit entity section 1310 share shall be distributed to Class 3 transit entities based

upon each transit entity's Class 3 State operating grant percentage. The actual amount received by each Class 3 transit entity under this clause shall be determined by multiplying a particular Class 3 transit entity's Class 3 State operating grant percentage times the total amount available for distribution under this clause.

(c) Change of classification.--If, during any fiscal year, either the number of vehicles operated by a local transportation organization or transportation company or the area served by such a local transportation organization or transportation company changes so that the local transportation organization or transportation company meets the criteria for a different transit entity class, as such criteria are set forth in section 1301 (relating to definitions), on or before July 15 of the fiscal year which follows such a change and in each fiscal year thereafter, the department shall reflect any change in the transit entity class of such a local transportation organization or transportation company in the Department of Transportation certification for that and subsequent fiscal years. In its calculation of the transit entity section 1310 shares for each transit entity class required by subsection (g)(1) and the transit entity section 1310.1 (relating to supplemental public transportation assistance funding) shares for each transit entity class required by subsection (g)(1) for the fiscal year following the change in a local transportation organization or transportation company's transit entity class and thereafter, the department shall include the amount of the transit entity sections 1310 and 1310.1 shares allocated to such a local transportation organization or transportation company for the fiscal year prior to the change in the transit entity class, in the transit entity sections 1310 and 1310.1 shares for the new transit entity class of such a local transportation organization or transportation company, and shall delete an equal amount from the transit entity sections

1310 and 1310.1 shares for the transit entity class for which such a local transportation organization or transportation company no longer meets the criteria in the new fiscal year. No local transportation organization or transportation company which has changed from one transit entity class to another due to either an increase in the number of vehicles operated or the United States Census Bureau's declaring its service area an urbanized area shall receive less than the amount transferred on its account by the department pursuant to this section.

(d) Oversight.--The department shall initiate and maintain a program of review and oversight for any projects receiving funds distributed pursuant to this section and section 1310.1 (relating to supplemental public transportation assistance funding). The department is authorized to perform independent financial audits of the financial statements of each local transportation organization, transportation company or community transportation program receiving moneys pursuant to this section. These audits shall be conducted in accordance with generally accepted auditing standards. Any financial statements subject to the audit or reports resulting from the audit shall be prepared and presented in accordance with generally accepted accounting principles, consistently applied with previous statements rendered for or on behalf of such organization or company. The department may coordinate such audits in conjunction with audits undertaken by the Auditor General.

(e) Fiscal year and capital budget.--

(1) The governing body of each local transportation organization or transportation company shall establish a fiscal year for capital programs. No later than the last day of each fiscal year for capital programs, each local transportation

organization or transportation company receiving moneys pursuant to this section shall adopt a capital budget and an asset maintenance spending plan for submission to the department.

(2) The capital budget shall include the following:

(i) A description of any such project.

(ii) The projected cost of any project to be undertaken, including supporting cash flow.

(iii) The duration of any such project, including the projected starting date, completion date and projected useful life of the project.

(iv) The proposed funding sources for any project.

(v) A description of projects completed in the prior fiscal year and their impact on operations.

(vi) A description of progress to date on projects initiated in the prior fiscal year but not yet completed.

(vii) An explanation of any significant project delays.

(viii) The use of funds under this section in the prior fiscal year, including projects for which they were used.

(ix) A multiyear plan for future use of funds received under this section for a period of not less than five years.

(x) Any other matter desired by the governing body of such local transportation organization or transportation company.

(3) The asset maintenance spending plan shall include:

(i) The amount of moneys expended for asset maintenance costs.

(ii) The purposes for which such funds were expended.

(iii) Those asset maintenance costs which are projected to be funded during the subsequent twelve months by the local transportation organization or transportation company.

(iv) A multiyear plan for future use of funds received under this section for a period of not less than five years.

(4) The capital budget and the asset maintenance spending plan shall be established by formal action of the governing body of such local transportation organization or transportation company following an opportunity for comment by the public and the department. Upon submission, the department will review and may make recommendations to the local transportation organization or transportation company concerning the capital budget and asset maintenance spending plan.

(5) The capital budget and the asset maintenance spending plan may be amended by formal action of the governing body of such local transportation organization or transportation company from time to time. Any amendments to the capital budget and the asset maintenance spending plan shall be transmitted to the department for its review, and the department may make recommendations to the local transportation organization or transportation company concerning any amendments to the capital budget and the asset maintenance spending plan.

(f) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Capital project, asset maintenance and other program funds." Moneys made available to finance capital projects and asset maintenance costs of local transportation organizations, transportation companies or community transportation programs or to fund other programs specified in this section from:

(1) any fund of the Commonwealth where the legislation creating such fund references this part and states that some or all of the moneys in such fund are to be used to finance capital projects and asset maintenance costs of local transportation organizations, transportation companies or community transportation programs and to fund certain other programs; or

(2) any other source, where such moneys are made available specifically to finance capital projects and asset maintenance costs of local transportation organizations, transportation companies or community transportation programs in accordance with this section.

"Class 1 section 1310 percentage." Seventy and three-tenths percent.

"Class 2 section 1310 percentage." Twenty-five and four-tenths percent.

"Class 3 section 1310 percentage." Four and three-tenths percent.

"Class 1 to 3 section 1310 allocation." The total amount of capital project, asset maintenance and other program funds

available for distribution by the Treasury Department during a particular month, less:

(1) the amount of the Department of Transportation project management oversight share to be paid each month under subsection (b)(2);

(2) the amount of the community transportation program section 1310 share to be paid each month under subsection (b)(3);

(3) the amount of the planning, development, research, rural expansion and department-initiated programs section 1310 share; and

(4) the amount of the Class 4 transit entity section 1310 share to be paid each month under subsection (b)(5).

"Class 1 transit entity section 1310 share." The product of the Class 1 section 1310 percentage times the Class 1 to 3 section 1310 allocation.

"Class 2 transit entity section 1310 share." The product of the Class 2 section 1310 percentage times the monthly Class 1 to 3 allocation.

"Class 3 transit entity section 1310 share." The product of the Class 3 section 1310 percentage times the monthly Class 1 to 3 allocation.

"Class 4 transit entity section 1310 share." Four million dollars during the 1991-1992 fiscal year and $4,160,000 during the 1992-1993 fiscal year. During the 1993-1994 through 1996-1997 fiscal years, the term shall mean the Class 4 transit entity section 1310 share for the prior fiscal year plus

(or minus) the product of the Class 4 transit entity section 1310 share for the prior fiscal year times the percentage increase or decrease in the total funds available for distribution pursuant to this section received by the Treasury Department in the most recently completed fiscal year as compared with the prior fiscal year. For the 1997-1998 fiscal year and each fiscal year thereafter, the term shall mean 2.8% of the total amount of capital project, asset maintenance and other program funds projected by the department to be available under this section for distribution during the subject fiscal year.

"Class 3 Federal operating cap percentage." The percentage determined by dividing the Federal operating ceiling for a Class 3 transit entity by the total Federal operating ceilings for all Class 3 transit entities.

"Class 3 State operating grant percentage." The percentage determined by dividing the State subsidy received pursuant to section 1303 (relating to annual appropriation and computation of subsidy) during fiscal year 1990-1991 by a Class 3 transit entity as stated in the latest Department of Transportation certification by the total State subsidies received pursuant to section 1303 during fiscal year 1990-1991 by all Class 3 transit entities as stated in the latest Department of Transportation certification. For purposes of calculating the amount received by a Class 3 transit entity pursuant to section 1303, any Federal funds transferred from other local transportation organizations and transportation companies from the Federal fiscal year 1990- 1991 Governor's apportionment allocation, contained in the Urban Mass Transportation Act of 1964, shall be considered to be amounts received pursuant to section 1303.

"Class 3 total passenger section 1310 percentage." The

percentage determined by dividing the total passengers transported by a Class 3 transit entity as stated in the latest Department of Transportation certification by the total number of passengers transported by all Class 3 transit entities as stated in the latest Department of Transportation certification.

"Class 3 vehicle hour section 1310 percentage." The percentage determined by dividing the vehicle hours of a Class 3 transit entity as stated in the latest Department of Transportation certification by the total number of vehicle hours of all Class 3 transit entities as stated in the latest Department of Transportation certification.

"Class 3 vehicle mile section 1310 percentage." The percentage determined by dividing the vehicle miles of a Class 3 transit entity as stated in the latest Department of Transportation certification by the total number of vehicle miles of all Class 3 transit entities as stated in the latest Department of Transportation certification.

"Class 4 operating assistance grant section 1310 percentage." The percentage determined by dividing the Class 4 transit entity adjusted base grant received by a Class 4 transit entity by the total Class 4 transit entity adjusted base grants received pursuant to such act by all Class 4 transit entities during fiscal year 1990-1991 as stated in the Department of Transportation certification.

"Class 4 revenue hour section 1310 percentage." The percentage determined by dividing the revenue hours of a Class 4 transit entity as stated in the latest Department of Transportation certification by the total number of revenue hours of all Class 4 transit entities as stated in the latest Department of Transportation certification.

"Class 4 revenue mile section 1310 percentage." The percentage determined by dividing the revenue miles of a Class 4 transit entity as stated in the latest Department of Transportation certification by the total number of revenue miles of all Class 4 transit entities as stated in the latest Department of Transportation certification.

"Community transportation program section 1310 share." One million seven hundred thousand dollars during the 1991-1992 fiscal year, $1,768,000 during the 1992-1993 fiscal year and, during the 1993-1994 fiscal year and each fiscal year thereafter, shall mean the community transportation program section 1310 share for the prior fiscal year plus (or minus) the product of the community transportation program section 1310 share for the prior fiscal year times the percentage increase or decrease in the total funds available for distribution pursuant to this section received by the Treasury Department in the most recently completed fiscal year as compared with the prior fiscal year. However, in any fiscal year in which the total funds authorized to be expended from the State Lottery Fund for purposes enumerated in section 1312 (relating to community transportation programs) is less than $600,000, the community transportation program section 1310 share shall be increased so that the sum of the community transportation program section 1310 share plus the total amount of such moneys paid from the State Lottery Fund for purposes enumerated in section 1312 shall equal $2,300,000. The combined funding to any county for community transportation under sections 1310 and 1312 shall not exceed $250,000 in any fiscal year.

"Department of Transportation project management oversight share." One million dollars during the 1991-1992 fiscal year and, during the 1992-1993 fiscal year and each fiscal year thereafter, shall mean $1,000,000 or 0.25% of the total

amount of capital project, asset maintenance and other program funds available for distribution pursuant to this section received by the Treasury Department during the prior fiscal year, whichever is greater.

"Department of Transportation certification." The certification by the Department of Transportation to the Treasury Department under subsection (g).

"Department-initiated programs." Mass transportation programs with a regional or Statewide application, including, without limitation, capital projects in support of intercity rail passenger service, capital projects in support of intercity bus service, transit safety initiatives, public-private transportation partnerships, ridesharing incentive programs, transportation management associations and other multimodal transportation management projects.

"Federal operating ceiling." The maximum amount of Federal funds permitted to be used by a Class 3 transit entity to subsidize transit operations, as published in the November 23, 1990, Federal Register (or, where there is more than one transit entity in a region, the maximum amount of Federal funds which such Class 3 transit entity could have utilized to subsidize transit operations pursuant to the subregional allocation as specified in the applicable transportation improvement program) for fiscal year 1990-1991.

"Planning, development, research, rural expansion and department-initiated programs section 1310 shares." The sum of $83,333.33 plus 0.25% of the total capital project, asset maintenance and other program funds available for distribution by the Treasury Department during a particular month.

"Total passengers." The total of all revenue passengers plus

transfer passengers on second and successive rides of a local transportation organization or transportation company, which are funded in whole or in part by this part, with respect to the most recent fiscal year reported in the most recently issued Pennsylvania Mass Transit Statistical Report.

"Treasury Department." The State Treasurer and the Treasury Department of the Commonwealth.

(g) Certification to Treasury Department.--On or before July 15 of each fiscal year, the Department of Transportation shall calculate and certify to the Treasury Department the following:

(1) The Department of Transportation project management oversight share, the community transportation program sections 1310 and 1310.1 shares, the Class 1 transit entity sections 1310 and 1310.1 shares, the Class 2 transit entity sections 1310 and 1310.1 shares, the Class 3 transit entity sections 1310 and 1310.1 shares and the Class 4 transit entity sections 1310 and 1310.1 shares and the planning, development, research, rural expansion and department-initiated programs sections 1310 and 1310.1 shares.

(2) The names and addresses of each Class 1 transit entity, Class 2 transit entity, Class 3 transit entity and Class 4 transit entity and whether such program or entity is a Class 1 transit entity, Class 2 transit entity, Class 3 transit entity or Class 4 transit entity.

(3) The vehicle miles of each Class 3 transit entity, the total vehicle miles of all Class 3 transit entities, the Class 3 vehicle mile sections 1310 and 1310.1 percentages for each Class 3 transit entity, the vehicle hours of each Class 3 transit entity, total vehicle hours of all Class 3 transit entities, the Class 3

vehicle hour sections 1310 and 1310.1 percentages for each Class 3 transit entity, total passengers for each Class 3 transit entity, the total passengers for all Class 3 transit entities, the Class 3 total passenger sections 1310 and 1310.1 percentages for each Class 3 transit entity, the Federal operating ceiling for each Class 3 transit entity, the Federal operating ceiling for all Class 3 transit entities, the Federal operating cap percentage for each Class 3 transit entity, the State subsidy received pursuant to section 1303 (relating to annual appropriation and computation of subsidy) as described in the definition of "Class 3 State operating grant percentage" for each Class 3 transit entity, the State subsidy received pursuant to section 1303 as described in the definition of "Class 3 State operating grant percentage" for all Class 3 transit entities, and the Class 3 State grant percentage for each Class 3 transit entity.

(4) The operating assistance grant received by each Class 4 transit entity during fiscal year 1990-1991 pursuant to the act of February 11, 1976 (P.L. 14, No. 10), known as the Pennsylvania Rural and Intercity Common Carrier Surface Transportation Assistance Act, the operating assistance grant received by all Class 4 transit entities during fiscal year 1990-1991 pursuant to that act, the Class 4 operating assistance grant sections 1310 and 1310.1 percentages for each Class 4 transit entity, the revenue miles of each Class 4 transit entity, the revenue miles of all Class 4 transit entities, the Class 4 revenue mile sections 1310 and 1310.1 percentages of each Class 4 transit entity, the revenue hours for each Class 4 transit entity, the revenue hours for all Class 4 transit entities and the Class 4 revenue hour sections 1310 and 1310.1 percentages for each Class 4 transit entity.

APPENDIX 10

§ 1310.1. Supplemental public transportation assistance funding

(a) General rule.--Beginning July 1, 1997, 1.22% of the money collected from the tax imposed under Article II of the act of March 4, 1971 (P.L. 6, No. 2), known as the Tax Reform Code of 1971, up to a maximum of $75,000,000, shall be deposited in the Supplemental Public Transportation Account, which is established in the State Treasury. Within 30 days of the close of a calendar month, 1.22% of the taxes received in the prior calendar month shall be transferred to the account. No funds in excess of $75,000,000 may be transferred to the account in any one fiscal year. The money in the account shall be used by the department for supplemental public transportation assistance, to be distributed under this section. Transit entities may use supplemental assistance moneys for any of the purposes enumerated in section 1311 (relating to use of funds distributed). In addition to those enumerated purposes, Class 1, 2 and 3 transit entities also may use the base supplemental assistance share for general operations. Class 4 transit entities may use all supplemental assistance moneys for general operations.

(b) Distribution.--During each fiscal year, capital project, asset maintenance and other program funds designated as supplemental public transportation assistance funding to be distributed pursuant to this section shall be distributed as follows:

(1) On or before the fifth day of each month, the Treasury Department shall certify to the department the total amount of

money then available for distribution, and the department shall disburse the money on or before the 20th day of each month.

(2) Each month the department shall distribute to each local transportation organization or transportation company 1/12 of the base supplemental assistance share of that local transportation organization or transportation company.

(3) Each month the Treasury Department shall pay 1/12 of the community transportation program section 1310.1 share for that fiscal year to the Department of Transportation to make grants to counties pursuant to section 1312 (relating to community transportation programs) for the purpose of funding capital projects of community transportation programs.

(4) Each month the department shall distribute 1/12 of the Class 4 transit entity section 1310.1 share to Class 4 transit entities according to the same formula as provided for distribution of funds under section 1310(b)(5) (relating to distribution of funding), using the Class 4 transit entity section 1310.1 share in place of the Class 4 transit entity section 1310 share.

(5) Each month, after providing for payment of the portion of the base supplemental assistance share, the community transportation program section 1310.1 share and the Class 4 transit entity section 1310.1 share to be distributed that month, the department shall distribute all remaining capital project, asset maintenance and other program funds required to be distributed pursuant to this section according to the same formula as provided for distribution of funds in section 1310(b)(6), using the transit entity's section 1310.1 share in place of the transit entity's section 1310 share.

(c) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection. Any term used in this section but not defined in this subsection shall have the meaning given in section 1310(f):

"Base supplemental assistance share." The P.L. 103-122 percentage for each local transportation organization or transportation company multiplied by $54,616,000.

"Capital project, asset maintenance and other program funds." Moneys made available under this section to finance capital projects and asset maintenance costs of local transportation organizations, transportation companies or community transportation programs or to fund other programs specified in this section.

"Class 1 section 1310.1 percentage." 70.3%.

"Class 2 section 1310.1 percentage." 25.4%.

"Class 3 section 1310.1 percentage." 4.3%.

"Class 1 to 3 section 1310.1 allocation." The total amount of capital project, asset maintenance and other program funds available for distribution by the Treasury Department during a particular month less:

(1) the amount of the base supplemental assistance share to be paid each month under subsection (b)(2);

(2) the amount of the community transportation program section 1310.1 share to be paid each month under subsection (b)(3); and

(3) the amount of the Class 4 transit entity section 1310.1 share to be paid each month under subsection (b)(4).

"Class 1 transit entity section 1310.1 share." The product of the Class 1 section 1310.1 percentage times the Class 1 to 3 section 1310.1 allocation.

"Class 2 transit entity section 1310.1 share." The product of the Class 2 section 1310.1 percentage times the monthly Class 1 to 3 allocation.

"Class 3 transit entity section 1310.1 share." The product of the Class 3 section 1310.1 percentage times the monthly Class 1 to 3 allocation.

"Class 4 transit entity section 1310.1 share." For each fiscal year, the total amount projected by the department to be available for distribution in the fiscal year in accordance with this section, less $54,616,000, times 2.8%.

"Class 3 Federal operating cap percentage." The percentage determined by dividing the Federal operating ceiling for a Class 3 transit entity by the total of all Federal operating ceilings for Class 3 transit entities.

"Class 3 total passenger section 1310.1 percentage." The percentage determined by dividing the total passengers transported by a Class 3 transit entity, as stated in the latest Department of Transportation certification, by the total number of passengers transported by all Class 3 transit entities, as stated in the latest Department of Transportation certification.

"Class 3 vehicle hour section 1310.1 percentage." The percentage determined by dividing the vehicle hours of a Class 3 transit entity, as stated in the latest Department of

Transportation certification, by the total number of vehicle hours of all Class 3 transit entities, as stated in the latest Department of Transportation certification.

"Class 3 vehicle mile section 1310.1 percentage." The percentage determined by dividing the vehicle miles of a Class 3 transit entity, as stated in the latest Department of Transportation certification, by the total number of vehicle miles of all Class 3 transit entities, as stated in the latest Department of Transportation certification.

"Class 4 operating assistance grant section 1310.1 percentage." The percentage determined by dividing the Class 4 transit entity adjusted base grant received by a Class 4 transit entity, as stated in the latest Department of Transportation certification, by the total Class 4 transit entity adjusted base grants received by all Class 4 transit entities during fiscal year 1990- 1991, as stated in the latest Department of Transportation certification.

"Class 4 revenue hour section 1310.1 percentage." The percentage determined by dividing the revenue hours of a Class 4 transit entity, as stated in the latest Department of Transportation certification, by the total number of revenue hours of all Class 4 transit entities, as stated in the latest Department of Transportation certification.

"Class 4 revenue mile section 1310.1 percentage." The percentage determined by dividing the revenue miles of a Class 4 transit entity, as stated in the latest Department of Transportation certification, by the total number of revenue miles of all Class 4 transit entities, as stated in the latest Department of Transportation certification.

"Community transportation program section 1310.1 share." The greater of:

(1) $1,200,000; or

(2) the total amount projected by the Department of Transportation to be available for distribution in the subject fiscal year in accordance with this section, less $54,616,000, times 2.5%.

"P.L. 103-122 percentage." The percentage determined by dividing the operating assistance grant or operating assistance limitation, whichever is greater, but not to exceed the total apportionment of funds made available to a particular local transportation organization or transportation company in this Commonwealth for each Class 1 transit entity, Class 2 transit entity and Class 3 transit entity and the base grants approved for each Class 4 transit entity pursuant to Public Law 103-122, 107 Stat. 1199, for the Federal fiscal year ending September 30, 1994, by the total of such amounts for all Commonwealth local transportation organizations and transportation companies pursuant to Public Law 103-122 for the fiscal year as determined by the Department of Transportation.

§ 1311. Use of funds distributed

(a) Approval of department.--

(1) No money made available pursuant to section 1310 (relating to distribution of funding) shall be expended on any capital project by any local transportation organization or transportation company until after the local transportation organization or transportation company submits the project to

the department for approval and the department approves the project. At the option of the local transportation organization or transportation company, capital projects may be submitted to the department on an annual basis at the time the local transportation organization or transportation company submits its capital budget to the department or at another time chosen by the local transportation organization or transportation company.

(2) The department shall establish criteria for approval of capital projects pursuant to this subsection, including, but not limited to, consideration of estimated useful life, demonstration of need and reasonableness of cost.

(3) Amendments to capital projects may be submitted at any time to the department for its review and approval in accordance with the procedures specified by the department.

(4) The department shall prescribe, under the authority of this chapter, reasonable procedures, including deadlines, for the department to review, comment and approve the capital project or projects submitted by a local transportation organization or transportation company.

(b) Funding purposes enumerated.--Moneys distributed pursuant to section 1310 shall be used by local transportation organizations and transportation companies for purposes of paying:

(1) all costs of capital projects, including, without limitation, the costs of acquisition, construction, installation, start-up costs of operations, improvement and all work and materials incident thereto, provided that funds expended for capital projects pursuant to section 1310shall be matched by local or

private funding in an amount equal to at least one-thirtieth of the project cost;

(2) debt service and the cost of issuance of bonds, notes and other evidences of indebtedness which a local transportation organization or transportation company is permitted to issue under any law of this Commonwealth; and

(3) to the extent permitted by this section, asset maintenance costs. Community transportation programs shall use moneys distributed pursuant to this section only for purposes enumerated in section 1312 (relating to community transportation programs).

(c) Certain capital projects.--Notwithstanding any other provision of law, each local transportation organization or transportation company receiving moneys pursuant to section 1310 may use such moneys, in the discretion of such local transportation organization or transportation company, to fund all or a portion of capital projects listed in the program prepared pursuant to section 2002(a)(13) of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929.

(d) Management of funds.--

(1) Each local transportation organization or transportation company receiving moneys pursuant to section 1310 and 1310.1 (relating to supplemental public transportation assistance funding) shall hold such moneys in an account separate from other funds of the local transportation organization or transportation company and shall invest such moneys until such funds are used in accordance with this section, with such funds being invested in accordance with the limits on investment of the local transportation organization or

transportation company. Notwithstanding any other provisions of this chapter, any interest earned shall be used for capital projects and asset maintenance costs during any period as determined by the local transportation organization or transportation company.

(2) All moneys distributed pursuant to section 1310 and utilized for asset maintenance under subsection (e) shall be matched by local or private funding in an amount equal to at least 1/30 of the amount expended for such purposes, except that, in the case of Class 3 and 4 transit entities, no matching funds shall be required if the department shall have received from the local governmental funding source which would otherwise provide the matching funds a certification that compliance with the matching requirement would create an undue financial burden upon the local governmental funding source such that a curtailment of government services endangering public health and safety would ensue.

(3) All moneys distributed pursuant to section 1310.1 and utilized under this section shall be matched by local or private funding in an amount equal to at least 1/30 of the amount expended for such purposes, except that, in the case of Class 3 and 4 transit entities, no funds utilized for asset maintenance under subsection (e) shall require a local match if the department shall have received from the local governmental funding source which would otherwise provide the matching funds a certification that compliance with the matching requirement would create an undue financial burden upon the local governmental funding source such that a curtailment of government services endangering public health and safety would ensue.

(e) Asset maintenance.--

(1) Each local transportation organization or transportation company may expend moneys distributed pursuant to sections 1310 and 1310.1 shares to fund asset maintenance costs as provided in this subsection.

(2) Moneys distributed pursuant to sections 1310 and 1310.1 may only be used to fund asset maintenance costs incurred during the fiscal year in which such moneys are allocated. Thereafter, such funds may only be used to fund capital projects.

(3) On or before March 1 of each year, the department shall certify to each local transportation organization or transportation company the amount of capital project, asset maintenance, base supplemental assistance and other program funds which the department estimates each local transportation organization or transportation company will be entitled to receive during the ensuing fiscal year. Each local transportation organization or transportation company may expend moneys distributed pursuant to sections 1310 and 1310.1 shares to fund asset maintenance costs up to the following maximum percentages of the estimate from the department, including accrued interest, the amount received during the prior fiscal year or the amount actually received in the current fiscal year, whichever is greater:

(i) Class 1 transit entities may utilize for asset maintenance costs up to a maximum of 30% of the funds received pursuant to sections 1310 and 1310.1 shares.

(ii) Class 2 and 3 transit entities may utilize for asset maintenance costs up to a maximum of 50% of the funds received pursuant to sections 1310 and 1310.1.

(iii) Deleted.

(iv) Class 4 transit entities may utilize for asset maintenance costs up to a ~~maximum of~~ 50% of the funds received pursuant to sections 1310 and 1310.1.

(f) Eligible projects.--Notwithstanding any other provision of this chapter, moneys provided under section 1310to community transportation programs may be expended only in accordance with section 1312 and only to fund all or a portion of eligible projects of such entities as enumerated in section 1312.

(g) Matching funds.--The moneys provided to local transportation organizations, transportation companies or community transportation programs pursuant to section 1310 may be used as matching funds to obtain Federal aid for capital projects.

(h) Use by department.--Funds appropriated to the department pursuant to section 1310(b)(2) and (4) may be utilized by the department for the purposes provided in either of such paragraphs.

(i) Accounting.--Within 120 days after the end of each fiscal year for capital programs established by the local transportation organization or transportation company pursuant to section 1310(e), each local transportation organization and transportation company receiving moneys pursuant to sections 1310 and 1310.1 shares shall transmit to the department an accounting of all funds received pursuant to section 1310 and 1310.1 shares in that fiscal year. The accounting shall be in a form prescribed by the department and shall include a listing of all expenditures on a project by project basis and the status of all unspent funds. The local transportation organization or transportation company shall grant access to the department or its duly authorized

representatives to any and all records pertaining to funds received pursuant to section 1310 and 1310.1 shares.

(j) Limit on certain amounts expended.--Notwithstanding any law to the contrary and except as provided in subsection (a) for Class 4 transit entities, local transportation organizations and transportation companies are authorized to expend moneys distributed pursuant to section 1310 and 1310.1 shares for asset maintenance costs in an amount not to exceed the greater of:

(1) the maximum amount of asset maintenance expenditures which could have been approved by the department for expenditure by that local transportation organization or transportation company for the 1991-1992 fiscal year pursuant to section 17(a) of the act of August 5, 1991 (P.L. 238, No. 26), entitled "An act amending Titles 74 (Transportation) and 75 (Vehicles) of the Pennsylvania Consolidated Statutes, codifying provisions relating to public transportation; imposing certain fees and taxes; further providing for certain Pennsylvania Turnpike projects; defining 'farm equipment'; further providing for the responsibilities of vehicle transferees, for exemptions from registration and certificates of title and for the use of dealer plates, multipurpose dealer plates and farm equipment plates; further providing for funeral processions; further providing for a restricted receipts fund and for registration for snowmobiles and ATV's; establishing the Snowmobile Trail Advisory Committee; further providing for the highway maintenance and construction tax; and making repeals," based upon a projection of $200,000,000 in total dedicated capital assistance funds plus estimated amounts of supplemental public transportation assistance funding available for distribution pursuant to section 1310.1 in that fiscal year,

which estimate shall not be less than $75,000,000 in any fiscal year; or

(2) the amount permitted to be expended for such purposes under subsection (e).

§ 1312. Community transportation programs

(a) Grants from lottery fund.--All counties except counties of the first and second class shall be entitled to grants from the State Lottery Fund for the purpose of adding, replacing, upgrading and overhauling equipment and purchasing, constructing or renovating facilities to serve as office and maintenance sites for the provision of reduced fare demand-response service. Equipment that may be purchased shall include, but shall not be limited to, vehicles, vehicle rehabilitation, major drivetrain components, communication equipment, computer equipment and software and office equipment and furnishings. The amount entitled to all counties and to be granted by the department shall not exceed $2,300,000. The department may require the counties to coordinate the acquisition of equipment through a Statewide purchase program should the department find such a program to be cost efficient.

(b) Procedure.--

(1) The department is hereby authorized to make grants to all counties, except those of the first and second class, or to entities designated by such counties to coordinate services under this section in such county, for the purpose of adding, replacing, upgrading and overhauling equipment for the provision of shared-ride transit services responsive to and accessible by the general public as well as the elderly and

disabled. If sufficient funds remain after all department approvals for such equipment projects have been fully funded, the department is hereby authorized to make grants for the purchase, construction or renovation of facilities to serve as office and maintenance sites for the provision of shared-ride transit services responsive to and accessible by the general public as well as the elderly and disabled. Equipment that may be purchased shall include, but shall not be limited to, vehicles, vehicle rehabilitation, major drivetrain components, communication equipment, computer equipment and software and office equipment and furnishings.

(2) Counties other than counties of the first and second class may obtain grants pursuant to this subsection by filing with the department an application in a form prescribed by it. The department shall require with such application a transportation plan plus such other information as the department may require.

(3) The applicant shall certify that all efforts possible have been made to coordinate local service for the elderly and disabled and the services to be offered with these capital assets do not duplicate existing fixed route services, as provided under the act of February 11, 1976 (P.L. 14, No. 10), known as the Pennsylvania Rural and Intercity Common Carrier Surface Transportation Assistance Act, and under other provisions of this part. The applicant shall solicit comments from the local public body fixed route provider and include any such comments as part of the application.

(4) All purchases pursuant to this subsection shall be made in accordance with bidding procedures established under the act of May 2, 1945 (P.L. 382, No. 164), known as the Municipality Authorities Act of 1945, or the act of August 9,

1955 (P.L. 323, No. 130), known as The County Code, whichever is applicable.

(c) Availability of funds.--Funds not expended under this section in the fiscal year in which they were made available shall not lapse and shall be available for use pursuant to this section in the next succeeding fiscal years.

§ 1313. Additional programs

(a) Projects and programs enumerated.--The department is hereby authorized to incur costs directly or to make grants, undertake and provide financial support:

(1) To new rural transportation systems for the purpose of funding capital, asset maintenance and operating costs of new rural transportation systems. New rural transportation systems may obtain grants under this section by filing for each fiscal year with the department an application in a form prescribed by it. The department shall require with the application a transportation plan plus such other information as the department may require to establish to the satisfaction of the department that the new rural transportation system is deserving of a grant under this section.

(2) For the purpose of funding studies, analysis, planning and development of programs for public transportation assistance, services and facilities.

(3) To incur costs directly or to make grants for department-initiated programs.

(4) To make grants to Class 4 transit entities for the significant expansion of services by such entities from funds

remaining in the development, planning and rural expansion share after all grants have been made for the fiscal year pursuant to paragraphs (1) and (2). Grants from the development, planning and rural expansion share shall be used by the Class 4 transit entity for the construction, acquisition, capital projects, asset maintenance and operating costs of the expansion of such entity. Class 4 transit entities may obtain grants by filing for each fiscal year with the department an application in a form prescribed by it. The department shall require with the application a transportation plan plus such other information as the department may require to establish to the satisfaction of the department that the Class 4 transit entity is deserving of a grant under this section.

(b) Availability of funds.--Funds not expended under this section in the fiscal year in which they were made available shall not lapse and shall be available for use pursuant to this section in the next succeeding fiscal years.

§ 1315. Public transportation grants management accountability

(a) Performance audits.--All classes of transit entities shall complete periodic management performance audits which shall encompass all public transportation programs and services financed in whole or in part by grants provided by the department as follows:

(1) The department shall establish criteria to be included in a performance audit performed pursuant to this section. The criteria shall be published in the Pennsylvania Bulletin. Separate criteria may be established for each class of transit entity.

(2) Management performance audits shall be completed within ten months of their initiation and shall be performed as follows:

(i) Class 1 transit entities shall begin the initial management performance audit required pursuant to this section no later than July 1, 1999, or, with the written approval of the department, within five years of the completion of the most recent performance audit. Thereafter, Class 1 transit entities shall complete a management performance audit at least once every five years.

(ii) Class 2 transit entities shall begin the initial management performance audit required by this section no later than July 1, 2000, or, with the written approval of the department, within five years of the most recent performance audit. The department may extend the initiation date for a period of up to five years. Thereafter, Class 1 transit entities shall complete a management performance audit at least once every five years.

(iii) Class 3 transit entities in urbanized areas with a population of 200,000 or greater shall begin the initial management performance audit required by this section no later than July 1, 2001. Class 3 transit entities in urbanized areas with a population of less than 200,000 shall begin the first management performance audit required by this section no later than July 1, 2002. Thereafter, Class 3 transit entities shall perform a management performance audit at least once every seven years.

(iv) Class 4 transit entities shall begin the first initial management performance audit required by this section no later than July 1, 2002. Thereafter, Class 4 transit entities shall perform a management performance audit at least once

every ten years. The department shall perform management performance audits for Class 4 entities through qualified independent contractors unless written notice is provided to the department by the Class 4 transit entity that the transit entity wishes to perform its own audit. The notice shall be provided no later than one year prior to the initiation date of the next scheduled audit.

(3) Class 1, 2 and 3 transit entities shall bear all costs of performing management performance audits pursuant to this section. The cost of such management performance audits for Class 4 transit entities shall be paid by the department from funds made available under section 1310(d) (relating to distribution of funding).

(4) For Class 1, 2 and 3 transit entities, the management performance audit shall be conducted by a qualified independent auditor selected by competitive procurement. Procurement documents shall specify the scope of the audit, comply with department criteria and be submitted to the department for written approval prior to procurement.

(b) Submission of audit report; transit entity response.--

(1) Upon receipt of a final audit report from the auditor or, in the case of Class 4 transit entities, from the department, each transit entity shall prepare an action plan addressing the findings and recommendations of the audit report. The action plan shall be completed and approved by the transit entity's governing body within two months of receipt of the final audit report. The transit entity shall implement its action plan in accordance with the time frames specified in the plan.

(2) Upon approval of the action plan by the entity's governing body, the transit entity shall submit the plan and the auditor's

report to the department. Class 1 and 2 transit entities shall also submit their action plans to the Legislative Budget and Finance Committee, the chairman and minority chairman of the Transportation Committee of the Senate and the chairman and minority chairman of the Transportation Committee of the House of Representatives.

(c) Customer satisfaction surveys.--Customer satisfaction surveys shall be conducted as follows:

(1) All Class 1 and 2 entities shall conduct customer satisfaction surveys at least once every two years. Class 3 and 4 transit entities shall conduct customer satisfaction surveys at least once every three years. An initial customer satisfaction survey for each transit entity shall be completed and submitted to the department no later than December 31, 1998.

(2) The department shall provide guidelines regarding the scope of the surveys and suggested questions which may be included in the surveys.

(3) Upon completion of the survey, the transit entity shall submit a report to the department containing survey methodology, survey results, relevant trends in the level of customer satisfaction and actions taken or planned to improve customer satisfaction.

(d) Suspension of grant funds.--The department may suspend eligibility for grants under section 1303 (relating to annual appropriation and computation of subsidy) for any transit entity which fails to comply with any of the provisions of this section.

(e) Restoration or continuation of funding.--The department shall continue eligibility of a transit entity for grants under

section 1303 if the entity has initiated its audit or survey in a timely manner and the delay in completion of the audit or survey is not the fault of the transit entity. The department shall restore eligibility of a suspended transit entity at such time as the audit or survey is completed in accordance with the requirements of this section.

(f) Cost reduction and productivity improvement.--As part of its annual application for funding under section 1310, Class 1, 2, 3 and 4 transit entities shall include a report outlining initiatives it has undertaken to reduce costs and improve productivity.

No. 06-268

IN THE
Supreme Court of the United States

PORT AUTHORITY OF ALLEGHENY COUNTY,
Petitioner,

v.

DANIELLE STANGL
and YVETTE KOERNER,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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October 2006

QUESTION PRESENTED

Whether the Third Circuit should have held that the Port Authority of Allegheny County is an arm of Pennsylvania for Eleventh Amendment purposes because a state statute refers to it as a state agency and Pennsylvania provides approximately 60% of its non-federal funding, even though the Port Authority is a separate corporate body that can sue and be sued and make contracts, its board of directors is appointed locally, it has multiple sources of funding besides the Commonwealth, and it cannot hold Pennsylvania liable for any judgment against it.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 3

I. In Using A Multi-Factor Analysis To Determine Whether The Port Authority of Allegheny County Is An Arm Of Pennsylvania, The Decision Below Followed The Analysis This Court Uses In Determining Whether An Entity Is Entitled To The State's Immunity. 3

II. The Court Of Appeals' Analysis Of The State Treasury Prong Of The Arm-of-the-State Analysis Does Not Conflict Either With This Courts' Precedents Or With Other Circuits. .. 6

III. The Third Circuit Correctly Concluded That The Port Authority Of Allegheny County Is Not An Arm Of Pennsylvania. 10

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Alaska Cargo Transport, Inc. v. Alaska Railroad Corp.,
5 F.3d 378 (9th Cir. 1993) 7, 8, 9, 10

Alden v. Maine
527 U.S. 706 (1999) 5

Christy v. Pennsylvania Turnpike Commission,
54 F.2d 1140 (3d Cir. 1995) 11

Febres v. Camden Board of Education,
445 F.3d 227 (3d Cir. 2006) 6

Federal Maritime Commission v. South Carolina State Ports Authority,
535 U.S. 743 (2002) 5

Hess v. Port Authority Trans-Hudson Corp.,
513 U.S. 30 (1994) 1, 4, 5, 7, 11

James J. Gory Mechanical Contracting, Inc. v. Philadelphia Housing Authority,
579 Pa. 26 (2004) 11

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,
440 U.S. 391 (1978) 10, 13

Mayle v. Pennsylvania Department of Highways,
479 Pa. 384 (1978) 11

Morris v. Washington Metropolitan Area Transit Authority,
781 F.2d 218 (D.C. Cir. 1986) 8, 10

Mt. Healthy City School District Board of Education v. Doyle,
429 U.S. 274 (1977) 1, 10

Regents of the University of California v. Doe,
519 U.S. 425 (1997) 5

Ristow v. South Carolina Ports Authority,
58 F.3d 1051 (4th Cir. 1995) 9

Southern Insurance Co. of New York v. Chatham County,
126 S. Ct. 1689 (2006) 1

Toombs v. Manning,
835 F.2d 453 (3d Cir. 1987) 11

STATUTES

55 Pa. Const. Stat. Ann. § 553(a) 10

55 Pa. Const. Stat. Ann. § 553(b) 7, 11, 12

55 Pa. Const. Stat. Ann. § 556 11

INTRODUCTION

"Only States and arms of the State" possess sovereign immunity under the Eleventh Amendment. *Southern Ins. Co. of N.Y. v. Chatham County*, 126 S. Ct. 1689, 1693 (2006). In determining whether an entity is an "arm of the State," or whether it is "more like a county or city" not entitled to immunity, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977), this Court considers multiple "indicators of immunity or the absence thereof," *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994), including how much control the state has over the entity, whether its implementing legislation considers it a state agency, and whether a judgment against the entity would be paid out of the state treasury. *Id.* at 44-48. The decision below followed this Court's guidance in *Hess* and used a multi-factor analysis to conclude that the Port Authority of Allegheny County is not an arm of Pennsylvania for Eleventh Amendment purposes.

In its petition for certiorari, Petitioner dismisses the *Hess* analysis, claiming that *Hess* has been "subsumed under the preservation and respect due to States as sovereign entities." Pet. at 12. It argues that there is a conflict between the decision below and this Court's statements in later cases that the main purpose of sovereign immunity is to provide dignity to the states. The later cases cited by Petitioner, however, do not consider whether entities are arms of the state and in no way overturn *Hess*. And Petitioner's invocation of the broad principles behind sovereign immunity cannot obscure the fact that the Third Circuit properly applied the standards this Court has used to determine whether an entity is an arm of the state for Eleventh Amendment purposes.

Petitioner also claims that the Third Circuit misapplied *Hess* to the facts of this case and created a conflict between the circuits by denying immunity to the Port Authority of Allegheny

County even though Pennsylvania provides the entity funding pursuant to state law. But Pennsylvania's voluntary provision of approximately 60% of the Port Authority's non-federal budget in a given year does not place the same type of obligation on Pennsylvania to pay judgments against the entity that this Court, in *Hess*, and lower courts, in the cases cited by Petitioner, have found can help cloak an entity with the state's immunity.

In short, the Court of Appeals' opinion neither conflicts with this Court's precedents nor with the lower court decisions cited by Petitioner. The Third Circuit correctly concluded that the Port Authority of Allegheny County is not an arm of Pennsylvania entitled to the state's sovereign immunity, and certiorari should be denied.

STATEMENT OF THE CASE

In July 2002, respondents Danielle Stangl and Yvette Koerner, employees of the Port Authority of Allegheny County's Transit Police and Security Department, sued the Port Authority and the chief of its police department, contending that they were denied positions as police officers due to gender discrimination and retaliation. Shortly before the case was to go to trial, the Port Authority filed a motion claiming it was a state entity that was immune to suit under the Eleventh Amendment. Pet. App. 8a-10a.

The district court denied the motion, applying a three-pronged test that looked at: (1) whether the money that would pay the judgment would come from the state; (2) the status of the agency under state law; and (3) the agency's degree of autonomy. *Id.* 14a-15a.

Focusing on the first prong, the court rejected the Port Authority's argument that it met that prong simply because it received approximately 60% of its non-federal funding from the state. "To give too much weight to the mere proportion of funding" the court stated, "would make Eleventh Amendment immunity dependent on the whim of the state legislature." *Id.* 18a. The court found instead that "the most telling factor" was "whether the Commonwealth is obligated to pay the judgment or any indebtedness of the Port Authority." *Id.* Noting that Pennsylvania had no such obligation, it concluded that the first prong weighed against immunity. *Id.* 19a.

The court then determined that the second prong (status under state law) weighed in favor of immunity and that the third prong (degree of autonomy from the state) weighed against it. Overall, it held that the Port Authority was not an arm of the state entitled to immunity under the Eleventh Amendment. *Id.*

In an unpublished opinion, the Third Circuit affirmed, "substantially for the reasons set forth in the District Court's well-reasoned opinion." *Id.* 5a.

REASONS FOR DENYING THE WRIT

I. In Using A Multi-Factor Analysis To Determine Whether The Port Authority of Allegheny County Is An Arm Of Pennsylvania, The Decision Below Followed The Analysis This Court Uses In Determining Whether An Entity Is Entitled To The State's Immunity.

Petitioner's primary argument for certiorari is that if a state creates an entity, gives it money, and says it is a state agency, federal courts must hold that the entity is entitled to

immunity or else they are offending the state's dignity and thereby disregarding this Court's statements that a primary purpose of sovereign immunity is to accord dignity to the states. Even if Petitioner's depiction of Pennsylvania law's view of the Port Authority of Allegheny County were complete, which it is not, as discussed in section III below, that according respect to the states is a central purpose of sovereign immunity does not mean that state law's view of whether an entity is a state agency is dispositive under federal law. To the contrary, this Court has looked at multiple factors concerning the entity's structure and its relationship with the state in determining whether an entity is an arm of the state for Eleventh Amendment purposes.

The decision below followed this Court's analysis in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994). There, although the Court explained that the Eleventh Amendment "emphasizes the integrity retained by each State in our federal system," *id.* at 39, it considered a variety of factors in determining whether the Port Authority Trans-Hudson Corporation (PATH) was an arm of the state. In addition to looking at whether state law considered the entity a state agency, the Court examined indicators of state and local control, whether the entity's functions were state or local, whether the state was financially responsible for the entity, and whether the state bore liability for the entity's debts. *Id.* at 44-46. After finding that these factors pointed in different directions, the Court noted that "Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations." *Id.* at 48. It went on to explain that the proper focus, in determining whether an entity is an arm of the state, should be whether "the State [is] in fact obligated to bear and pay the resulting indebtedness of the enterprise[.] When the answer is 'No' – both legally and practically – then the Eleventh Amendment's

core concern is not implicated." *Id.* at 51. Notably, this Court found that the PATH was not an arm of the state, even though state courts had "repeatedly . . . typed the Port Authority an agency of the States." *Id.* at 44.

Petitioner claims that, by not considering Pennsylvania's creation of the Port Authority and its declarations that the Port Authority is an agent or arm of the state to be "dispositive determinations that Port Authority is entitled to sovereign immunity," Pet. at 9, the Court of Appeals violated *Regents of the University of California v. Doe*, 519 U.S. 425 (1997), *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), and *Alden v. Maine*, 527 U.S. 706 (1999). That is not so. In *Doe*, this Court recognized that "the question whether a money judgment against a state instrumentality or official would be enforceable against the State is of considerable importance" in determining whether a state instrumentality may invoke the state's sovereign immunity. 519 U.S. at 430. And *Federal Maritime Commission* and *Alden* do not even discuss the factors relevant to whether an entity is an arm of the state. *See Fed. Maritime Comm'n*, 535 U.S. at 747 (holding that state sovereign immunity applies to adjudications conducted by the commission); *Alden*, 527 U.S. at 712 (holding that Congress does not have authority under Article I to abrogate a state's sovereign immunity in its own state court). Petitioner cites them only because they contain statements about the principles behind the Eleventh Amendment. Petitioners' invocation of these broad principles, however, does not change the fact that the Third Circuit's treatment of whether state law considers the entity a state agency as just one of many factors to examine in determining whether the entity is an arm of the state is entirely consistent with this Court's jurisprudence.

II. The Court Of Appeals' Analysis Of The State Treasury Prong Of The Arm-of-the-State Analysis Does Not Conflict Either With This Courts' Precedents Or With Other Circuits.

Focusing attention on the language in *Hess* that the proper focus of the inquiry is whether the state will be legally or *practically* obligated to bear an entity's debts, Petitioner claims that the Court of Appeals "merely applied one-half of the analysis proffered by this Court in *Hess* to determine the potential threat of a judgment against the Commonwealth's treasury." Pet. at 10. That is not the case.

For starters, the Third Circuit's decision does not say that the state treasury prong of the test can never be met if the state is not legally obligated to bear the entity's debts. To the contrary, it includes "whether payment will come from the state's treasury" and "whether the agency has the money to satisfy the judgment" as two of the three factors to consider in determining whether a judgment would affect the state treasury. Pet. App. 4a. And it cites *Febres v. Camden Board of Education*, 445 F.3d 227 (3d Cir. 2006), Pet. App. 4a-5a, which, while determining that a state's legal obligation merits greater weight than the practical effects of a judgment on the state treasury, also found that "the practical or indirect financial effects of a judgment may enter a court's calculus." *Febres*, 445 F.3d at 236.

Moreover, Petitioner's fixation on the word "practically" causes it to lose sight of the fact that this Court's focus is on whether a state will be *obligated*, legally or practically, to pay a judgment obtained against an entity. *See Hess*, 513 U.S. at 51. Petitioners' sole argument for why the state treasury prong weighs in its favor is that Pennsylvania

voluntarily provides approximately 60% of the Port Authority's non-federal funding and that it has chosen to dedicate a stream of funding to the entity. As the district court pointed out, however, Pennsylvania's voluntary contribution to the Port Authority's budget does not, alone, demonstrate that the Commonwealth would be obligated to pay a judgment against the Port Authority. Nor does Pennsylvania's discretionary contribution to the Port Authority lead to the conclusion that "'as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries.'" *Hess*, 513 U.S. at 50 (quoting *Morris v. Wash. Metro. Area Transit Auth.*, 781 F.2d 218, 227 (D.C. Cir. 1986) (*WMATA*)). In fact, the Port Authority has other funding sources and is authorized to borrow money, issue notes and bonds, and accept grants. 55 Pa. Const. Stat. Ann. § 553(b).

Petitioner makes much of this Court's citation in *Hess* to *WMATA* and *Alaska Cargo Transport, Inc. v. Alaska Railroad Corp.*, 5 F.3d 378 (9th Cir. 1993), two cases in which transportation agencies were found to be immune from suit. Indeed, Petitioner asserts that there is a circuit conflict because these "nearly identical" authorities, Pet. at 5, were granted sovereign immunity even though their states were not legally responsible for their debts. Although the entities in *WMATA* and *Alaska Cargo* were also transportation authorities, however, the relationships they bore with their states differed from the relationship the Port Authority has with Pennsylvania. These differences explain why the entities in *WMATA* and *Alaska Cargo* were granted sovereign immunity, while the Port Authority of Allegheny County was not, and demonstrate the limited circumstances in which a state may be obligated, in a practical but not legal manner, to pay a judgment against an entity.

In *WMATA*, the D.C. Circuit held that the United States Congress, Maryland, and Virginia had successfully conferred immunity on the Washington Metropolitan Area Transit Authority (WMATA), an entity created by interstate compact to run a mass transit system for the greater Washington, D.C. area. 781 F.2d at 220. The court reached this conclusion by considering the multiple factors set out in this Court's cases for determining whether an entity is an arm of the state for sovereign immunity purposes. With regard to whether the state treasury would be obligated to pay a judgment against WMATA, the court noted that, under the terms of the compact that created WMATA, costs that exceeded revenues were to be shared among the federal, District of Columbia, and local governments, and that Congress explicitly made the federal government's contribution "contingent on the local participating governments or Compact signatories providing WMATA with a 'stable and reliable source of revenue sufficient to meet'" WMATA's operating deficits, *id.* at 225-26 (citation omitted), which Maryland and Virginia had done. *Id.* at 226 n.10. The court went on to explain that WMATA could not levy taxes, and that, although it could issue bonds, it could pledge the contracts of the signatory parties as security for those bonds. Under these circumstances, the D.C. Circuit did "not think the payments to WMATA by Maryland and Virginia are aptly characterized as 'voluntary.'" *Id.* at 227.

In *Alaska Cargo*, the Ninth Circuit considered whether the Alaska Railroad Corporation (ARRC) was entitled to sovereign immunity. The court found that the state treasury prong was inseparable from whether the entity performed a central government function. 5 F.3d at 380. Emphasizing the importance of the railroad to the state, given the state's unique geography, the court determined that ARRC did, indeed, perform a central governmental function. *Id.* at 381. It then

noted that state law required ARRC to seek legislative appropriations if subsidies were needed to maintain services that were not self-sustaining, and that federal law required Alaska to provide rail carrier services or else real property conveyed to Alaska when the United States government gave it the railroad would revert to the federal government. Given the confluence of these state and federal laws, the court agreed with the district court that "'if faced with a large money judgment, ARRC would be compelled to turn to legislative appropriation in order to remain in business, and the legislature would have to respond favorably . . . .'" *Id.* (*quoting Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 834 F.Supp. 1216, 1221 (D. Alaska 1991)). The Ninth Circuit then went on to examine whether ARRC could sue and be sued, whether it could take property in its own name, and its corporate status, deciding "on balance" that ARRC was entitled to immunity. *Id.* at 382.[1]

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[1]Petitioner also claims a conflict with *Ristow v. South Carolina Ports Authority*, 58 F.3d 1051 (4th Cir. 1995), a post-*Hess* case in which the Fourth Circuit held that the South Carolina Ports Authority was entitled to sovereign immunity. There, however, state law provided that South Carolina could withdraw money from the Ports Authority if it found that the money was not necessary or desirable for the Ports Authority's operations, and, over the course of the Ports Authority's life, the state had withdrawn over $1.5 million. Because "the Ports Authority surplus is subject to the unfettered discretion of the South Carolina General Assembly," the court noted, "such 'surplus' was effectively the state's in the first instance," and the legislature would not be able to withdraw such surpluses "if the Ports Authority's operation funds have been depleted by judgments against it." *Id.* at 1054 & n.9.

Although the Port Authority claims that Pennsylvania would be "practically obligated" to pay judgments against it, Pet. at 12, Pennsylvania's voluntary provision of approximately 60% of its non-federal funding does not constitute the sort of obligation referred to in *Hess* and found in *WMATA* and *Alaska Cargo*. In addition, the Port Authority differs from the entities in *WMATA* and *Alaska Cargo* on other of the factors considered in the fact-intensive, multi-factor test used to determine if an entity is an arm of the state. *See, e.g., Alaska Cargo*, 5 F.3d at 382 (unlike Port Authority, ARRC could not issue bonds without legislative approval); *WMATA*, 781 F.2d at 227 (unlike Port Authority, states were represented on WMATA's board of directors). The Court of Appeals' analysis neither misconstrued *Hess* nor conflicts with the circuit court cases cited by Petitioner, and certiorari should be denied.

III. The Third Circuit Correctly Concluded That The Port Authority Of Allegheny County Is Not An Arm Of Pennsylvania.

Application of the factors set forth by this Court in *Hess*, and in the other cases in which it has considered whether an entity is an arm of the state for Eleventh Amendment purposes, *see Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401-02 (1979); *Mt. Healthy*, 429 U.S. at 280-81, demonstrate that the Court of Appeals was correct in concluding that the Port Authority of Allegheny is not an arm of Pennsylvania for Eleventh Amendment purposes.

First, although Petitioner stresses that its enabling legislation refers to it as a state agency, 55 Pa. Const. Stat. Ann. § 553(a), it was not so structured under state law. The Port Authority was created as a separate body "corporate and politic in counties of the second class." *Id.* It has a perpetual

existence, can "sue and be sued," and possesses the power to acquire and hold property. *Id.* §§ 553(b)(1),(2), & (5). It can also make contracts "of every name and nature," and is specifically authorized to "enter into contracts . . . with the Commonwealth of Pennsylvania," as well as with the federal government, municipalities, and corporations. *Id.* §§ 553(b)(11) & (12).[2]

"Indicator[s] of local governance," *Hess*, 513 U.S. at 44, further weigh against the Port Authority being considered an arm of the state. The governing body of the Port Authority – its Board of Directors – is appointed by county government, which also determines Board members' compensation. 55 Pa. Const. Stat. Ann. § 556. Allegheny county can only appoint residents of the county to the Board. *Id.* One member of the Board must

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[2]Petitioner also emphasizes that the Pennsylvania Supreme Court has held that the Port Authority is a Commonwealth agency within the meaning of Pennsylvania's sovereign immunity statute. However, "[i]n enacting the sovereign immunity statute, the Pennsylvania legislature merely conferred upon entities . . . by way of statute that which they otherwise lacked, namely, immunity from suit in state court." *Christy v. Pa. Turnpike Comm'n*, 54 F.3d 1140, 1149 (3d Cir. 1995); *see also Mayle v. Pa. Dep't of Highways*, 479 Pa. 384, 386 (1978) (abolishing common law sovereign immunity in Pennsylvania). The Pennsylvania sovereign immunity statute covers entities that were not immune under common law, *see Toombs v. Manning*, 835 F.2d 453, 459 (3d Cir. 1987), and whether an entity is a state agency under the sovereign immunity statute is not determinative of whether it is a state agency for other purposes. *See James J. Gory Mech. Contracting, Inc. v. Phila. Hous. Auth.*, 579 Pa. 26, 38-39 (2004).

be a member of the County Council. *Id.* The Port Authority itself makes by-laws to manage its affairs; employs its own officers, agents, and employees; and sets its own fares, without state control. *Id.* §§ 553(b)(7), (8), & (9).

Finally, analysis of the effect of a judgment against the Port Authority on Pennsylvania's treasury militates against granting the Port Authority immunity as an arm of the state. The Port Authority's enabling legislation explicitly states that Pennsylvania will not be legally liable for the entity's obligations:

> [The Port Authority] shall have no power, at any time or in any manner, to pledge the credit or taxing power of the Commonwealth of Pennsylvania or any political subdivision, nor shall any of its obligations be deemed to be obligations of the Commonwealth of Pennsylvania or any of its political subdivisions, nor shall the Commonwealth of Pennsylvania or any political subdivision thereof be liable for the payment of principal or interest on such obligations.

55 Pa. Const. Stat. Ann. § 553(b)(18). Moreover, the Port Authority has many funding sources besides the Commonwealth. It can "borrow money, make and issue negotiable notes, bonds, refunding bonds and other evidences of indebtedness or obligations of the authority, and [] secure the payment of such bonds." *Id.* § 553(b)(10). It can also borrow money and accept grants from the federal government, Pennsylvania, municipalities, and corporations. *Id.* § 553(b)(12). And it can "pledge, hypothecate, or otherwise encumber all or any of the revenues or receipts of the authority

as security for all or any of the obligations of the authority." *Id.* § 553(b)(14). In addition, it receives funding through fare collection, "for the purpose of providing for the payment of the expenses of the authority . . . [and] the payment of the principal and interest on its obligations." *Id.* § 553(b)(9). Given that, according to the record, Port Authority expected to receive close to $100 million from non-Commonwealth sources in fiscal year 2005, *see* Pet. App. 11a, there is no evidence that the Port Authority would be incapable of satisfying a judgment against it with non-Commonwealth funds. Indeed, all evidence points in the other direction.

In sum, Pennsylvania did not structure the Port Authority of Allegheny County in a way that would "enable it to enjoy the special constitutional protection of the States themselves." *Lake Country*, 440 U.S. at 401. The Court of Appeals was correct in concluding that the Port Authority is not entitled to immunity under the Eleventh Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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